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Cutting the Nimbian Knot: A Primer

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CUTTING THE NIMBIAN KNOT: A PRIMER

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INTRODUCTION

The Not-in-My-Backyard ("NIMBY") phenomenon is well understood today. Local groups organize to oppose, and often defeat, a proposal of potentially disruptive community impact. Such proposals are sometimes referred to as Locally Unwanted/Unloved Land Uses ("LULUs"). The NIMBY problem has been escalating in recent years.[1] Opposition exists to projects as varied as nuclear power plants,[2] dams,[3] prisons,[4] roads,[5] halfway houses and group homes,[6] day-care centers,[7] sanitary landfills,[8] incinerators,[9] oil refineries,[10] low-

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1. *See* Delogu, *"NIMBY" as a National Environmental Problem*, 35 S.D.L. REV. 198 (1990).

2. Disputes over nuclear power are longstanding. However, the relatively small "research" reactors on the campuses of many universities have received little attention. Columbia University constructed a 250-kilowatt reactor on 120th Street and Amsterdam that on its Morningside Heights Campus in Manhattan. New York City enacted an ordinance which required municipal licensing of a nuclear reactor. The ordinance was held preempted by the Atomic Energy Act. *See* United States v. City of New York, 463 F. Supp. 604, 614 (S.D.N.Y. 1978). After the Three Mile Island accident, Columbia University canceled plans to activate the reactor. N.Y. Times, May 20, 1979, at 23, col. 1.

3. *See, e.g.*, Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980) (holding that an environmental impact statement that addressed a dam construction project was adequate, and, therefore, injunctive relief was denied); Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) (same); Oregon Natural Resources Council v. Marsh, 677 F. Supp. 1072 (D. Or. 1987) (holding that the Army Corps of Engineers was allowed to continue partial construction of a dam).

4. *See, e.g.*, Ely v. Velde, 497 F.2d 252 (4th Cir. 1974) (holding that the State of Virginia could not divert federal aid that was slated for construction of a penal reception and medical center, when construction of the center met public opposition); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (holding that in determining whether a federal action to construct a jail will "significantly" affect the human environment, the proposed project shall be considered according to the adverse environmental effects it will cause, over and above the effects created by existing uses in the area and the qualitative harmful environmental effects of the action itself), *cert. denied*, 412 U.S. 908.

5. *See, e.g.*, Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989) (affirming the lower court's lifting of an injunction that prevented construction of a highway); Druid Hills Civil Ass'n v. Federal Highway Admin., 833 F.2d 1545 (11th Cir. 1987) (same), *cert. denied*, 488 U.S. 819 (1988); Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984) (same).

6. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). In a test case, the Justice Department filed suit against the City of Cleburne, claiming that the city had denied a special-use permit to construct a group home for the mentally retarded because of opposition by neighbors. *Id.* at 437. The Supreme Court struck down the city zoning ordinance that required the

income public[11] and senior citizen housing,[12] commuter train stations,[13] military bases, installations, and projects,[14] and weather stations.[15] Society recognizes the need for many of these facilities, but few communities are receptive to them.[16] In the past, society had generally followed an implicit policy of ignoring uncertain environmental risks until disaster struck.[17] Now, potentially impacted communities attempt to stop the LULUs before any actual risk materializes.

The public collectively desires the benefits of an affluent society but does not wish to bear individually the risks and costs that accompany material prosperity.[18] As long as the electricity goes on with the click of a switch, or the water

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permit on equal protection grounds. *Id.* at 435; *see also* Lee, *Suburb Sued for Unfair Zoning*, A.B.A. J., Sept. 1989, at 40 (describing a similar lawsuit, filed under the amended Fair Housing Act, against the City of Chicago Heights, Illinois). The case was eventually settled when the city agreed to issue a previously denied permit to construct the home, as well as pay $45,000 in damages. N.Y. Times, Jan. 17, 1990, at A16, col. 4.

7. *See, e.g.*, Howard v. City of Garland, 917 F.2d 898 (5th Cir. 1990) (upholding a zoning ordinance that prohibited a commercial day-care facility to operate for more than four nonresidential children without a use permit).

8. *See infra* notes 69-96 and accompanying text.

9. *See, e.g.*, Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986) (finding a Union County, Arkansas ordinance preempted by the Resource Conservation Recovery Act).

10. Between 1970 and 1990, at least two dozen attempts to build a new East Coast refinery failed. Crim, *The Nimby Syndrome in the 1990s: Where Do You Go After Getting to "No"?*, 21 Env't Rep. (BNA) No. 1, at 132, 133 (May 4, 1990); *see also In re* Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973) (affirming the Environmental Improvement Commission's denial of plaintiff's application to develop an oil refinery).

11. *See, e.g.*, Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973) (denying a community's effort to enjoin the building of a moderate to low-income housing project).

12. *See, e.g.*, United Neighbors Civic Ass'n v. Pierce, 563 F. Supp. 200, 206-07 (E.D.N.Y. 1983) (holding that the Department of Housing and Urban Development did not act arbitrarily in declining to require the filing of an environmental impact statement before a senior citizen housing project with less than 500 units was constructed); Lower Moreland Homeowner's Ass'n v. Department of Housing & Urban Dev., 479 F. Supp. 886, 901 (E.D. Pa. 1979) (holding that a homeowner's association was entitled to a preliminary injunction to prevent the Department of Housing and Urban Development from financing a senior citizens' housing project).

13. *See, e.g.*, Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1975) (holding that an environmental impact statement drawn up with regard to an urban mass transportation project was sufficient despite protests of city residents), *aff'd sub nom.* Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth., 576 F.2d 573 (5th Cir. 1978).

14. *See, e.g.*, Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976) (denying a community's effort to enjoin construction of a military base).

15. *See* N.Y. Times, Apr. 16, 1990, at B3, col. 5.

16. As Professor Delogu noted, "The range of developments, and activities which individual towns frequently seek to exclude encompasses both public and private sector undertakings that are essential and integral parts of our society on both an economic and social sense." Delogu, *The Dilemma of Local Land Use Control: Power Without Responsibility*, 33 ME. L. REV. 15, 19 (1981).

17. *See* Silver, *The Common Law of Environmental Risk and Some Recent Applications*, 10 HARV. ENVTL. L. REV. 61, 62 (1986).

18. *See generally* Glaberson, *Coping in the Age of NIMBY*, N.Y. Times, June 19, 1988, § 3, at 1, col. 2 (discussing the rise in popularity of "NIMBY" groups).

flows with the twist of a valve, or the garbage disappears when the truck goes by, the public is satisfied. They do not understand the long-term, comprehensive planning that goes into providing basic services. A clear consensus once existed that dams, bridges, highways, and power plants represented progress.[19] In the not-too-distant past, communities vied for major development projects because of the economic, growth-inducing benefits to the area. Increasing the number of jobs, expanding the property tax base, and fortifying a community's infrastructure were all viewed as "desirable progress."[20] Today, short of an emergency situation, little public support exists in an impacted area for new projects. What we have in many places today is a 1991 economy trying to run on a 1961 infrastructure.

Opposition is often based on the "what if" question. The "what if" question assumes that if, for whatever reason, the unlikely occurs, the tragedy will be of catastrophic proportions. Thus, the "what if" question focuses on the magnitude of the potential injury with a veritable parade of horribles. The question does not consider the probability of the occurrence.

One court accepted the "what if" argument in the following terms:

> It may be that such a disaster could occur only upon a concatenation of circumstances of not too great probability, and that the odds are against it. It is common experience, however, that catastrophes occur at unexpected times and in unforeseen places . . . . A court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate.[21]

Thus, the "what if" question seeks zero-risk as an acceptable level. No threat to human life is acceptable. In a sense, America has acquired a desire to be risk-free; a very low threshold of tolerable risk exists. NIMBYism also reflects a wider problem of the body politic, that is, a paralysis of fear and thus, a paralysis of will.

The idea that the environmental problems that confront twentieth century civilization transcend artificial political boundaries is axiomatic. Whether the problem is truly of an international dimension, such as acid rain or ozone depletion, or seemingly of a much more mundane nature, such as garbage dispo-

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19. In reviewing the famous benzene case, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980), Professor Rodgers wrote that the disparate opinions among justices in the case may reflect simply "the fact that we live in a time when values are in disarray. Institutions caught in the flux of technological and social change are in for a rough ride until and unless new grounds for consensus emerge." Rodgers, *Judicial Review of Risk Assessment: The Role of Decision Theory in Unscrambling the Benzene Decision*, 11 ENVTL. L. 301, 302 (1981).

20. This view was best exemplified when states granted eminent domain powers to railroads and utilities. Although compensation was paid for the taking of the lands, environmental factors were irrelevant to the actual exercise of eminent domain. Montana went so far as to give a private copper company, Anaconda, the power to condemn private lands for copper production, which resulted in one-fifth of Butte, Montana being devoured by an open pit mine. *See* MONT. CODE ANN. §§ 70-30-102(15), 70-30-103-4, 82-2-221 (1988).

21. Harris Stanley Coal & Land Co. v. Chesapeake & Ohio Ry. Co., 154 F.2d 450, 453 (6th Cir.), *cert. denied*, 329 U.S. 761 (1946).

sal, the reality is that solutions must often occur on a comprehensive basis—be it regional, state, national, or global. Nevertheless, the fact that at one level, such as the state or county, governmental bodies are actively seeking a solution, does not preclude other bodies of government, such as cities, towns, or even neighborhoods in the impacted area, from actively opposing the proposal. Such strong crosscurrents do not readily make for comprehensive planning.

Local opposition can forestall any meaningful solution to an environmental problem. NIMBYism concentrates on the immediate threat. The long-term consequences of defeating the project, to the detriment of society as a whole, are not considered because the community is only concerned with the immediate local impact. Local defeat of a project often dooms comprehensive planning, entails adverse regional and national consequences, and frequently increases the risks and costs for everyone, including the hostile community. For example, local opposition to hazardous waste treatment facilities or new sanitary landfills increases illegal dumping of toxic waste and solid waste. In other words, the alternative to legal disposal is the "Midnight Dumper." Similarly, local bans or restrictions on the transportation of hazardous substances may often result in simply diverting the hazardous materials to another jurisdiction, often at an increased risk to society as a whole.[22]

Community bans can result in total paralysis.[23] By way of example, Brookhaven National Laboratories generates nuclear waste on Long Island.[24] The only land route off Long Island is through New York City.[25] The shipment of waste from Brookhaven suddenly came under the glare of attention after a twenty-five year perfect safety record.[26] The director of the New York City Health Department's Bureau of Radioactive Control estimated that release of just one percent of the cargo in densely populated Queens or Manhattan would cause 100,000 "prompt deaths" and one million fatal cases of cancer.[27] This is truly a "what if" scenario that, at the minimum, unnerves the public.

The New York City Council then banned the shipment of nuclear waste through New York, forcing the waste carrying trucks to enter the mainland through New London, Connecticut.[28] When Brookhaven requested permission from New London to schedule ten nuclear waste shipments through that city,

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22. *See* Note, *Preemption of Local Laws by the Hazardous Materials Transportation Act*, 53 U. CHI. L. REV. 654, 654-55 (1986) (suggesting that the roles of local and federal governments must be clarified before a harmonious network of regulations for safe waste transportation and disposal may be produced).

23. *See* Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982) (holding that the Illinois Spent Fuels Act, which prohibited the importation of spent nuclear fuel for storage at the only operating commercial spent fuel storage site in the United States, violated the commerce clause), *cert. denied*, 461 U.S. 913 (1983).

24. N.Y. Times, Apr. 17, 1978, at B3, col. 1.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

New London's health director denied the permits.[29] One resident of New London declared, "When you think of nuclear waste, you don't think of anything good. . . . As much as they don't want it there [in New York City], I don't want it here."[30] This statement ignores the larger amount of nuclear waste generated in eastern Connecticut[31] and the nuclear submarine construction a few miles away in Groton, Connecticut. The standoff was finally resolved by the Court of Appeals for the second circuit.[32] The appellate court upheld regulations promulgated by the United States Department of Transportation, pursuant to the Hazardous Materials Transportation Act.[33] The regulations allowed such hazardous materials to be transported along highways in densely populated areas, since, in the Department's view, this mode of transportation afforded an acceptable level of safety.[34] In effect, New York City's ban was preempted.

Similarly, bans on offshore oil drilling, no matter how rational they might appear to the local community in the wake of the Exxon Valdez incident and the legacy of the Santa Barbara oil blowout, impose great costs on the country. As a result of such bans, we are now importing almost half of our oil,[35] which necessitates more transportation. Statistically, transportation by tanker is much riskier than production of offshore oil.[36]

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29. Hartford Courant, Oct. 15, 1978, at 26, col. 1.

30. N.Y. Times, *supra* note 24, at B3, col. 2. Incidentally, the original route through 1976 involved shipping the spent fuel from Long Island, over the Queensboro Bridge to 59th Street, through midtown Manhattan, and exiting Manhattan over the George Washington Bridge. The new route involves traveling over the Throgs Neck Bridge to I-95, to the Cross Westchester Expressway, to the Tappan Zee Bridge, thereby bypassing Manhattan.

31. There are three nuclear reactors generating electricity in Waterford, Connecticut, which is ten miles from New London.

32. *See* City of New York v. United States Dep't of Transp., 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). In *City of New York*, the district court held that the Hazardous Materials Transportation Act required the Department of Transportation ("DOT") to implement regulations that maximized public safety not only for the nation as a whole, but for every jurisdiction in the country. City of New York v. United States Dep't of Transp., 539 F. Supp. 1237, 1289 (S.D.N.Y. 1982), *rev'd*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). Therefore, the lower court concluded that the DOT must require shippers to use the safest of the alternative forms of transportation. *Id.* The court declared that it was "impermissible, in the face of credible risk with substantial potential consequences, for DOT to declare a certain level of safety 'acceptable' regardless of the possibility of achieving higher levels through reasonable measures." *Id.* The court of appeals reversed, holding that Congress did not intend the regulation to maximize public safety, particularly on a jurisdiction-by-jurisdiction basis. *City of New York*, 715 F.2d at 740.

33. *See* 715 F.2d at 741.

34. *See id.* at 737-38.

35. Boston Globe, Mar. 28, 1991, at 1, col. 4, at 45, col. 1 (according to the American Petroleum Institute, imported oil accounted for 46.9% of total usage during 1990).

36. Organizers of a boycott against Exxon have compiled data from the Coast Guard Pollution Incident Reporting System showing that from 1980 through 1986, 91 million gallons of oil and 36 million gallons of other toxic substances were spilled into United States waters. Shabecoff, *The Rash of Tanker Spills Is Part of a Pattern of Thousands a Year*, N.Y. Times, June 29, 1989, at A20, col. 1. Two-thirds of the spilled oil came from tankers and barges. *Id.*

The methods used by communities to block or close LULUs can be subtle and sophisticated, or blunt. Such methods may range from outright bans, zoning,[37] size[38] and capacity limits, denial of erstwhile routine permits, statewide legislation or referenda,[39] strict safety inspections,[40] rigorous licensing requirements[41] and a variety of fee structures,[42] shipment-by-shipment or truck-by-truck permit requirements, studies ad infinitum,[43] and requirements of abso-

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37. "In San Diego, voters effectively barred incinerators by passing a zoning amendment banning them within a certain distance of schools." Peterson, *Toxic Ash and Costs Worry the Neighbors of Incinerators*, N.Y. Times, Nov. 15, 1987, at 1, col. 3, at 46, col. 1.

38. Goshen, New York enacted such an ordinance. The first provision of the ordinance limited the combined acreage of all existing and closed landfills in the town to a maximum of 300 acres. *See* Al Turi Landfill, Inc. v. Town of Goshen, 556 F. Supp. 231, 232 (S.D.N.Y.), *aff'd without opinion*, 697 F.2d 287 (2d Cir. 1982). The second part of the ordinance provided that no permit could be issued to a sanitary landfill that contained less than 10 acres or more than 50 acres. *See id.* at 235. In 1982, the number of operating and closed facilities totalled 294 acres; thus, a total of only six more acres was available for use as a landfill. *Id.* In *Al Turi Landfill*, because expanding the existing landfill by six acres would be uneconomical, the ordinance operated to preclude the plaintiff from expanding his existing facility. *See id.* The federal court held that the ordinance limiting the size of landfills in town did not violate the commerce clause. *Id.* at 236-38.

39. Washington State Bldg. & Constr. Trades Council v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981) (holding that a Washington state referendum that banned all nonmedical radioactive waste generated out of state was unconstitutional under both the supremacy clause and the commerce clause), *aff'd*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

40. For example, Pennsylvania turned back 28 out-of-state garbage trucks on March 14, 1990, for safety violations at the New Jersey border. *State Turns Back 28 Garbage Trucks in Safety Drive on Out-of-State Haulers*, 20 Env't Rep. (BNA) No. 47, at 1896 (Mar. 23, 1990). In September of 1989, Governor Robert P. Casey issued an executive order that directed state officials to cite trash haulers for failure to comply with Pennsylvania laws and regulations. *Id.* The practice has been labeled "trashnet." *Id.*

41. Rollins Envtl. Servs. (FS) v. Parish of St. James, 775 F.2d 627 (5th Cir. 1985). This case involved a parish ordinance that had the effect of shutting down a new facility established for draining and shipping PCB fluids. *Id.* at 631. The court ruled that the ordinance had the illegitimate objective of regulating an area already preempted by federal statute. *Id.* at 637. The court further stated that the ordinance violated the commerce clause. *Id.* at 635.

42. For example, Utah charges $20 per ton for out-of-state hazardous waste, as compared to only $8 for in-state hazardous waste. Wall St. J., Mar. 21, 1991, at A1, col. 5.

43. Delay can be achieved by seemingly endless and interminable studies. No decision can be reached until final studies are prepared and all issues resolved. The existing studies, however, will always raise issues requiring additional studies. *See, e.g.*, British Airways Bd. v. Port Auth., 564 F.2d 1002 (2d Cir. 1977). In *British Airways*, the Port Authority unsuccessfully attempted to bar Concorde SST flights into Kennedy Airport by conducting endless, duplicative studies of noise and vibration problems. *Id.* at 1004-05. The court stated:

> If ever there was a case in which a major technological advance was in imminent danger of being studied into obsolescence, this is it. There comes a time when relegating the solution of an issue to the indefinite future can so sap petitioners of hope and resources that a failure to resolve the issue within a reasonable period is tantamount to refusing to address it at all. The same is true of studying the question in such a manner that the issue will disappear by sheer frustration.

Id. at 1010.

Defeat of the unwanted can thus be achieved by studying a proposal to death. At the end of 1987, Waste Management abandoned its six-year battle to obtain the necessary permits from the federal government to incinerate toxic wastes at sea. Shabecoff, *Company Abandons Proposal on*

lute safety.[44] Pursuant to the question left open by *City of Philadelphia v. New Jersey*,[45] proposals have been made for states to take over ownership of facilities, thus enabling them to exclude out-of-state wastes. In one case, a county tried to condemn land to avoid a dump.[46] While public opposition usually confines itself to acceptable means, violent measures are sometimes taken,[47] such as torching of proposed halfway houses[48] and threats to a candidate's life.[49]

Burning Toxic Waste At Sea, N.Y. Times, Jan. 1, 1988, at 1, col. 1; *see also* Waste Management v. EPA, 669 F. Supp. 536 (D.D.C. 1987) (holding that the EPA's decision to defer issuing operating permits for ocean incineration until specific regulations were promulgated was not arbitrary, capricious, or an abuse of discretion). The EPA later closed down its ocean incineration rulemaking program and stopped work on proposed regulations. *New York Firm Says EPA Should Consider Ocean Incineration of Municipal Solid Waste*, 18 Env't Rep. (BNA) No. 49, at 2393 (Apr. 1, 1988).

Subsequently, the only other surviving proposal for ocean incineration was dropped, again after a failure of the EPA to issue the necessary regulations. *See* Seaburn, Inc. v. EPA, 712 F. Supp. 218 (D.D.C. 1989) (holding that EPA's interpretation of Ocean Dumping Ban Act, which equated ocean incineration with ocean dumping, was reasonable).

44. An editorial in the Los Angeles Times on the proposed Auburn Dam stated, "Let's build it if it's safe." *See* Okrent, *Comment on Societal Risk*, 208 SCIENCE 372, 374 (Apr. 25, 1980). The Auburn Dam, located roughly 30 miles northeast of Sacramento, California on the north bank of the American River, was to be 685 feet high and designed to withstand a sizable earthquake of a 5.5 magnitude on the Richter Scale with a foundation displacement of one inch. Hill, *California Rejects U.S. Dam Plan as Insufficiently Earthquake Proof*, N.Y. Times, Jan. 8, 1979, at A16, col. 4. A state advisory panel recommended that the dam be designed to withstand a 6.5 magnitude earthquake, with five inches of foundation displacement. California then effectively vetoed the dam after $200 million had been spent on it. *Id.* As of 1989, four full-time workers were still employed on the project, which by then had $300 million invested in it. Hoge, *Stalled Since '75, Auburn Dam Still Has Its Believers*, San Francisco Sunday Examiner & Chronicle, July 30, 1989, at B3, col. 1.

Only the Delaney Amendment for food additives incorporates a zero-risk standard for carcinogens. The amendment prohibits the Department of Health and Human Services from listing any additive that the Secretary finds to cause cancer in man or animals. 21 U.S.C. § 348(c)(3)(A) (1988). *See generally*, Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?* 5 YALE J. ON REG. 1 (1988) (discussing the scope of the Delaney Amendment and the Food and Drug Administration's enforcement of the amendment).

45. 437 U.S. 617 (1978); *see infra* notes 180-81 and accompanying text.

46. *See* Earth Management, Inc. v. Heard County, 248 Ga. 442, 283 S.E.2d 455 (1981) (holding that the county exceeded its eminent domain powers in condemning a parcel of land on the pretext that the land was necessary to build a public park when the county's real purpose in condemning the land was to prevent the construction of a hazardous waste disposal facility).

47. In New York, members of the Low-Level Radioactive Waste Siting Commission have been run off research sites and burned in effigy in upstate counties where they have identified potential low-level nuclear waste dumps. Verhovek, *Panel Proposes Paying Towns to Take Waste*, N.Y. Times, Jan. 18, 1991, at B3, col. 6.

48. In one instance, three residents of a quiet middle-class block in Queens, New York were charged with setting fire to an unoccupied house on their block. The city had intended to shelter six foster-care infants in the house. N.Y. Times, May 1, 1987, at A1, col. 5. Similarly, a fire, suspected to be caused by arson, destroyed a soon-to-be opened group home for mentally ill people in Nassau County, New York. N.Y. Times, Dec. 31, 1987, at B3, col. 4.

49. Governor Orr of Nebraska announced during her reelection campaign that her life had

NIMBY opposition is often not limited to proposed projects in one's own community. The "backyard" can be construed more broadly to include surrounding communities. For example, a consortium of local governments northwest of Chicago attempted to build a municipal solid waste landfill. Their attempt was challenged by four suburbs near the proposed facility.[50] On an even broader level, NIMBY sometimes translates as "NOPE"—"Nowhere On Planet Earth."

Community hostility should be viewed as genuine. People are naturally concerned about potential risks to themselves and their families, to the exclusion of the greater needs of the public at large.[51] Dramatic disasters, such as Bhopal, Chernobyl, Three Mile Island, and the Exxon Valdez, become ingrained in the public consciousness. Memories of these past incidents, which we can refer to as the "Love Canal Syndrome," are revived when new proposals are advanced. Phrases such as "known carcinogen," "increased risk of cancer," or "hazardous substance" are almost guaranteed to arouse instant fear and hostility. Fear of the "what if" question is so pervasive that facts alone, such as a one-in-a-million increase in the risk of cancer, will not, by themselves, overcome the fear.

No matter how irrational, fear exists, thereby precluding rational solutions to many problems. Government and expert assurances of safety are disbelieved.[52] Enactment of federal and state statutes, such as the Comprehensive

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been threatened as a result of her refusal to block a proposed radioactive-waste warehouse. N.Y. Times, Oct. 10, 1990, at A21, col. 3.

50. *Municipal Landfill Proposed near Chicago Subject to Legal Challenges by Four Suburbs*, 19 Env't Rep. (BNA) No. 3, at 82 (May 20, 1988).

51. This feeling is echoed in a statement by Senator Warren G. Magnuson of Washington State, who opposed a proposed oil transshipment facility, "Why should Puget Sound become a dumping point for somebody else's oil?" Seattle Post-Intelligencer, Sept. 3, 1977, at A3, col. 4.

These protective, exclusionary feelings are sometimes also reflected in local zoning ordinances. The case of Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), involved a zoning ordinance that restricted the number of persons, unrelated by blood, adoption, or marriage, that could live together in a residential area, to two. *Id.* at 2. The zoning ordinance was directly aimed at excluding "unruly and disruptive" students from the nearby SUNY-Stony Brook campus. *Id.* at 9. The court upheld the ordinance as a valid exercise of the zoning power. *Id.* at 10. Justice Douglas wrote, in words that closely echo the sentiments of many NIMBY disputes:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power . . . is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

One year later, Justice Douglas had much less sympathy for these perspectives when the subject was exclusionary zoning. *See* Warth v. Seldin, 422 U.S. 490, 518-19 (1975) (Douglas, J., dissenting) (dissenting from the majority's denial of standing on the ground that two of the plaintiff associations represented the communal feelings of the residents).

52. *See, e.g.*, Hartford Courant, Jan. 26, 1991, at 63, col. 3. The article, reporting on local concern about pesticide spraying of apple orchards, stated, "Although tests done on water wells near . . . [an] apple orchard show no contamination from pesticides, neighbors who requested the testing still worry that the pesticides are a health threat. 'We're not happy at all,' said [an adjoining neighbor]. . . . 'Pesticides are poison.' " *Id.*

Environmental Response, Compensation, and Liability Act ("CERCLA")[53] and the Resource Conservation and Recovery Act ("RCRA"),[54] have not *eased* the public's *concerns*.[55] Whether or not the public's fears are grounded in scientific fact is irrelevant because the public perception effectively becomes the public reality.[56] The potential becomes the actual to the public. The "what if" question becomes a certainty. Decisionmakers, particularly the representatives elected in the affected areas, must respond accordingly. In this atmosphere, inadequacies in the underlying database or preliminary figures subject to revision in later studies do not assuage the public's concerns. It is also prudent to keep in mind the admonitions of a manufacturer's spokesperson: "Technology can solve most of the problems, but it's hard to demonstrate that a 15-story incinerator won't be noticed in the neighborhood."[57]

Even if defeat of a proposed project constitutes a "victory" for the successful community, another failure for society has occurred. Defeat of a proposed project can be exceedingly costly to the proponent,[58] as well as send a message of deterrence to other developers. Yet, it is reasonable to expect that an impacted community will attempt to minimize the risk to itself so as to protect the health, safety, and general welfare of the community. In doing so, the "few" in the impacted community who will bear the risk, conflict with the multitude, who will partake of the benefits of the project. For example, in *Bradley v. American Smelting & Refining Co.*,[59] the plaintiffs complained of effluents blowing over their land from the defendant's plant.[60] The plaintiffs did not complain of actual damages; instead, the plaintiffs alleged that they suffered fear and anxiety about health risks associated with the defendant's emissions.[61] The Washington Supreme Court summarized the overall issue in terms that underlie the thrust of this Article:

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53. 42 U.S.C. §§ 9601-9675 (1988).

54. *Id.* §§ 6901-6987.

55. RCRA, 42 U.S.C. §§ 6901-6987 (1988), regulates existing and new on and off-site management facilities through a permit system. RCRA is intended to ensure that the facilities are safely designed and operated. Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 2 UCLA J. ENVTL. L. & POL'Y, 1, 2 (1981). In this respect, RCRA has failed in that most existing sites have closed down and few new ones have opened up, thereby limiting the disposal options for hazardous wastes.

56. The conflict is further intensified when state agencies, charged with regulating the LULU, view the problem as essentially a technical one to be solved by good engineering. At the same time, the impacted community may focus on the risk, distrusting the safety assurances of the experts. Tarlock, *supra* note 55, at 12-13.

57. Richards, *Burning Issue: Energy from Garbage Loses Some of Promise as Wave of the Future*, Wall St. J., June 16, 1988, at 1, col. 6, at 13, col. 1.

58. For example, after four years and $14 million in private investment, a proposal for a hazardous waste incinerator by Clean Harbors, Inc. in Braintree, Massachusetts, was defeated. Boston Globe, Sept. 21, 1990, at 53, col. 3.

59. 104 Wash. 2d 677, 709 P.2d 782 (1985) (answering certified questions from district court), *later proceeding*, 635 F. Supp. 1154 (W.D. Wash. 1986).

60. *Id.* at 679, 709 P.2d at 784.

61. Bradley v. American Smelting & Ref. Co., 635 F. Supp. 1154, 1158 (W.D. Wash. 1986).

> The issues present the conflict in an industrial society between the need of all for the production of goods and the desire of the landowner near the manufacturing plant producing those goods that his use and enjoyment of his land not be diminished by the unpleasant side effects of the manufacturing process. A reconciliation must be found between the interest of the many who are unaffected by the possible poisoning and the few who may be affected.[62]

The NIMBY syndrome often overlaps another phenomenon, referred to as "the law of unintended consequences." We tend to look at many problems in isolation, such that we "solve" the immediate problem without thinking of the consequences elsewhere.[63] For example, many communities have banned leaf burning because of the air pollution consequences. However, the need to dispose of leaves still remains. The second largest source of garbage is yard waste, therefore, banning leaf burning exacerbates the waste disposal problem in society.[64] In response, many communities now prohibit the dumping of landscape waste into landfills.[65] Thus, an ostensible solution to one problem, air pollution, led to another problem, overcrowded landfills, which is now in search of its own solution.

Occasionally, some communities are receptive to NIMBY activities. Even today, there are times when some communities or states actively solicit what others consider to be a LULU.[66] Ironically, once a community possesses an otherwise unwanted project, and its tax base soars, other communities wish to partake of the tax bonanza.[67]

In general, though, as long as states and local communities believe that they can export, exclude, or prevent the "problem," they have little incentive to resolve it. To the extent that individual communities can isolate themselves from the burdens of society, the result will be a balkanization of the United States. The purpose of this Article is to address ways to cut the NIMBian Knot. In doing so, we will take a look at the solid waste/hazardous waste disposal problem to illustrate NIMBian paralysis.

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62. *Bradley*, 104 Wash. at 681, 709 P.2d at 785. For a further discussion of *Bradley*, see *infra* notes 298-303 and accompanying text.

63. Thus, energy conservation, in the form of insulation, weatherizing, and winterization, increases risks from radon and other indoor air pollutants trapped in the semisealed building.

64. In 1988, yard waste constituted over 20% by weight and 10% by volume of municipal solid waste. Paper and paperboard products constituted 34% of the discards by weight and 34% by volume. U.S. EPA, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE ES-4 (Executive Summary 1990).

65. *See* ILL. ANN. STAT. ch. 111½, para. 1022.22 (Smith-Hurd 1990).

66. For example, a few years ago, three small, remote towns in the Mojave Desert vied for the siting of a low-level nuclear waste depository. N.Y. Times, Aug. 9, 1987, at 18, col. 1.

67. The city of Seneca, Illinois has the highest per capita expenditure of any school district in Illinois. Seneca can afford to spend so much on education because it allowed Commonwealth Edison Company to build a nuclear power plant there ten years ago. The utility pays about $10,000,000 per year to the community in taxes. Now other communities in the state are angling for ways to get their hands on the tax bounty. *See* Johnson, *Nuclear Plant Gives Schools Windfall Others Seek*, N.Y. Times, Dec. 31, 1990, at A1, col. 2.

I. WASTE DISPOSAL: THE PROBLEM

The NIMBY problem is best exemplified by both the solid waste and hazardous waste embroglios. This is due to the magnitude and consequences of the problem, as well as the extensively litigated and documented propensity of jurisdictions to go their own way, oblivious to the broader consequences of their actions. Early on, Professor Rodgers succinctly summarized the problem: "It is an axiom that solid waste and garbage belong in somebody else's backyard."[68] NIMBYism has caused existing facilities to close, has barred the opening of new landfills, and has limited the expansion of existing facilities.

A. Solid Waste

The number of landfills that accept solid waste is declining at a rapid pace. Many states have run out of capacity at existing facilities and are now exporting substantial quantities of garbage to other states and foreign countries.[69] Very few new sites are opening up, so the problem intensifies. The problem was highlighted a few years ago by the voyage of a barge carrying garbage from Islip, Long Island, searching for a port in the Caribbean to dispose of its cargo.[70] This modern version of Jason and the Argonauts was updated nightly on the evening news.

While the Islip, New York garbage barge received widespread national publicity, a barge containing 28 million pounds of Philadelphia incinerator ash voyaged much longer.[71] This barge wandered the seven seas for more than two years, unsuccessfully seeking a disposal site.[72] In September of 1986, the

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68. W. RODGERS, HORNBOOK ON ENVIRONMENTAL LAW 667 (1977). After all, not many people relish living near a landfill with its odors, pollution, and fleets of trucks. Perhaps Senator Dan Coats of Indiana has stated it best: "Hoosiers are no more anxious to live next to East Coast trash than the residents of the East Coast appear to be." Gold, *Shipping Trash out of State Stirs Backlash*, N.Y. Times, July 18, 1990, at B1, col. 6.

69. New England exports hundreds of tons of solid waste daily to Quebec. Boston Globe, Dec. 13, 1988, at 24, col. 1. The Marshall Islands have agreed to accept millions of tons of trash annually from a California waste disposal company for $56 million a year. Boston Globe, Dec. 23, 1989, at 6, col. 5.

70. Islip's problem was caused in part by enactment of a statute that sought to close landfills on Long Island. *See* N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1983). The statute is designed to protect Long Island's groundwater, which is the source of drinking water on the island, from contamination. *Id.* Pursuant to the statute, no new landfills in a deep flow recharge area are allowed, and existing facilities must be closed by the end of 1990. *Id.*; *see* Town of Islip v. Cuomo, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984) (granting partial summary judgment since the statute did not violate the relevant state constitutional provisions); *see also* New York Public Interest Research Group, Inc. v. Town of Islip, 71 N.Y.2d 292, 306-07, 520 N.E.2d 517, 524, 525 N.Y.S.2d 798 (1988) (upholding "an order on consent of the Department of Environmental Conservation allowing the continued use of an Islip landfill subject to various restrictions"). For a discussion of the growing national solid waste problem, see *Special Analysis, Barge Carrying Unwanted Garbage from Long Island Becomes Symbol for Larger Problem of Solid Waste Disposal*, 18 Env't Rep. (BNA) 332 (May 15, 1987).

71. *Ship Dumps Philadelphia Ash, But Where?*, N.Y. Times, Nov. 10, 1988, at A25, col. 1.

72. *After 2 Years, Ship Dumps Toxic Ash*, N.Y. Times, Nov. 28, 1988, at A22, col. 1.

Khian Sea sailed from Philadelphia for a disposal site in the Bahamas.[73] Eighteen months later, the barge was back in Philadelphia with most of the ash still aboard.[74] The barge subsequently slipped out of Philadelphia and later reported an unloading of the ash.[75] The cargo had been turned away by at least eleven countries, including the Bahamas, the Dominican Republic, Honduras, Costa Rica, Guinea-Bissan and Cape Verde.[76] During its two-year odyssey, the vessel was renamed twice, changing from the Khian Sea to the Felicia and finally the Pelican, and had been variously registered in Liberia, Honduras, and the Bahamas.[77]

The current crisis was certainly foreseeable. A 1973 study estimated that almost half of the country's cities would run out of current disposal capacity in one to five years.[78] The study warned that half of the cities could not rely totally upon land disposal of wastes within their own jurisdictions.[79] Instead, according to the study, these cities would have to consider other methods of disposal that did not require great areas of land.[80] One of the observations of the report was that solid waste management necessarily transcends local jurisdictions.[81]

Currently, the largest exporters of solid waste are New Jersey and New York. New Jersey, which complained of garbage imports in *City of Philadelphia v. New Jersey*,[82] now exports over half of its garbage.[83] Many New Jersey communities find it cheaper to ship garbage 400 miles to Ohio than to dispose of it at New Jersey sites.[84] Ohio imported 2.4 million tons of garbage

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Ship Dumps Philadelphia Ash, But Where?*, *supra* note 71, at A25, col. 1.

77. *After 2 Years, Ship Dumps Toxic Ash*, *supra* note 72, at A22, col. 1.

78. *See* NATIONAL LEAGUE OF CITIES & U.S. CONFERENCE OF MAYORS, SOLID WASTE MANAGEMENT TASK FORCE, CITIES AND THE NATION'S DISPOSAL CRISIS 18 (1973).

79. *Id.*

80. *Id.* at 2.

81. *Id.* at 7. Thus, the study recommended removing transportation barriers and resolving boundary restrictions against proper disposal across jurisdiction lines. *Id.* at 15. The report called for greater resource recovery and recycling, federal aid, statutes, and regulations.

82. 437 U.S. 617 (1978).

83. Gold, *Shipping Trash out of State Stirs Backlash*, N.Y. Times, July 18, 1990, at B1, col. 6 (stating that private carters in New Jersey export 55% of the state's trash); Schmidt, *The Midwest Tries to Slow the Flow of Eastern Trash*, N.Y. Times, Oct. 1, 1989, § 4, at 4, col. 1 (stating that many New Jersey towns and counties say that it is less expensive to truck garbage to Ohio). In addition, New York exports 11% of its garbage. N.Y. Times, July 19, 1990, at B1, col. 2. Between them, the two states account for over one-half of the interstate movement of trash. N.Y. Times, July 18, 1990, at B1, col. 6. New York exports 2.4 million tons of trash annually, and New Jersey exports 5.5 million tons. *Most Interstate Trash Movement Beneficial; New York, New Jersey Big Exporters, NSWMA Says*, 21 Env't Rep. (BNA) No. 13, at 537 (July 27, 1990). Neither state imports trash. *Id.*

84. Schmidt, *supra* note 83, at 4, col. 1. To some extent, New Jersey is responsible for its problems in solid waste disposal. There were 331 landfills operating statewide in New Jersey in 1972. Passell, *The Garbage Problem: It May Be Politics, Not Nature*, N.Y. Times, Feb. 26, 1991, at C1, col. 1, at C6, col. 1. By 1988, the number was down to 13, with only two prospective

in 1987, 1.5 million of which came from New Jersey.[85] Likewise, communities in New York are staggering under the economic costs of waste disposal.[86] Similarly, waste disposal problems are so pressing in parts of the Northeast and Midwest that the cost of local disposal can reach $150 per ton.[87]

Yet, rather than cooperating in local and regional efforts to resolve the issues, communities are attempting to stop garbage from entering their borders. Myopia precludes comprehensive solutions to the waste disposal problem. A few states act as though they believe that they can have it both ways, that is, ship whatever they want out of state at their discretion but bar shipments into the state. Of special note is Pennsylvania, which is trying to have the best of both possible worlds. Pennsylvania is the third largest exporter of municipal solid waste. The state also ships much of its hazardous and medical waste out of state.[88] Yet in 1989, Governor Casey of Pennsylvania issued an executive order that imposed a two-year moratorium on permits for new or expanded landfills.[89] The order provided an exception if the permit applicant could demonstrate a need for additional capacity, and could further show that at least seventy percent of the capacity would be utilized by sources located within Pennsylvania.[90] This second limitation essentially froze, at existing levels, the amount of out-of-state garbage Pennsylvania landfills could accept. In announcing the freeze, Governor Casey stated, "The ground is shifting under our feet [because of] the bulk of out-of-state trash. Today, we're taking a new and decisive step toward controlling our destiny."[91]

Similarly, New York, which exports eleven percent of its solid waste and a significant percentage of its hazardous waste, has attempted to limit imports of hazardous wastes to states that have reciprocal agreements with New York.[92]

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landfills seeking the requisite permits. *Id.*

85. Schmidt, *supra* note 83, at 4, col. 1.

86. Tax increases on Long Island are partially caused by the spiraling cost of collecting and disposing of garbage. Lyall, *As L.I.'s Garbage Mounts, Its Taxes Do Still,* N.Y. Times, Nov. 11, 1990, at B1, col. 2. For example, about 40% of Oyster Bay's $169,900,000 budget goes for garbage. *Id.* It pays $111 per ton to haul the garbage off the island. *Id.* An average homeowner with a $230,000 house will pay $424 in garbage taxes in 1991, or roughly half of the total tax bill of $829. *Id.*

87. Feder, *Railroads Meet Steep Grades in Trying to Haul Trash,* N.Y. Times, Dec. 2, 1990, § 3, at 12, col. 1.

88. *Philadelphia Freezes Landfill Permits in Attempt to Limit Out-of-State Garbage,* 20 Env't Rep. (BNA) No. 26, at 1122 (Oct. 27, 1989). Fifty-five percent of Pennsylvania's solid waste is exported. *Id.* at 1123.

89. Exec. Order No. 1989-8, 19 Pa. Bull. 4598 (Oct. 17, 1989), *reprinted in* 4 PA. CODE §§ 7.471-.476 (1990).

90. 4 PA. CODE § 7.471(a). Pennsylvania studies indicated that 30% of the municipal waste disposed of in Pennsylvania was generated outside the state. Johnson, *Beyond* City of Philadelphia v. New Jersey, 95 DICK. L. REV. 131, 151 (1990).

91. Paul, *Waste Spurs Uncivil War Between State,* Wall St. J., Nov. 17, 1989, at B13C, col. 3.

92. *New York to Limit Hazardous Waste Imports to States That Have Reciprocal Agreements,* 21 Env't Rep. (BNA) No. 25, at 1179 (Oct. 19, 1990). Thus, New York, which shipped 26,045 tons of hazardous waste to Ohio in 1988, tried to bar shipments from Ohio to a hazardous waste landfill in Model City, New York. Boston Globe, Nov. 20, 1990, at 3, col. 1.

The solid waste problem is not environmental; it is political.[93] The land is there, but the will is missing. Each local group, expressing its displeasure, frustrates solution. For example, the entrance to the Lopez Canyon Landfill was blockaded three times by angry citizens in an attempt to close the last remaining city-owned disposal site in Los Angeles. A proposed incinerator was scrapped and Los Angeles County refuses to accept any additional trash from the cities.[94]

Alternatives are rapidly shrinking.[95] Ocean incineration, although common in Europe, died as an alternative in the United States because the EPA dithered in issuing the appropriate administrative regulations.[96] On-land incineration, whether of a straight incineration nature or of a more "sophisticated" waste-to-energy process, is under major environmental scrutiny, primarily because of the high concentration of toxic materials in the ash. These materials include cadmium, mercury, and silver.

B. Hazardous Waste

The need to minimize, if not eliminate, hazardous waste generation at the source is widely recognized. Such a goal should be assiduously pursued. However, even zero generation of new hazardous waste will not eliminate the need for disposal sites for the hazardous wastes that are found in CERCLA/Superfund sites or which were otherwise illegally or improvidently disposed of in the past.[97] Quite often a CERCLA cleanup consists of transporting the

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New York itself withdrew from a group of Northeastern states working on a regional plan for disposing of toxic wastes because of perceptions that the state was being asked to take too much waste. The New York Environmental Conservation Commissioner was unwilling to allow New York to become the dumping ground of the Northeast for hazardous waste bound for landfills. N.Y. Times, Oct. 11, 1989, at B1, col. 1.

93. As Congress noted:

> Pressures from local citizens place the political system in an extremely vulnerable position. . . . The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of creating new facilities]. A common result has been . . . no significant increase in hazardous waste capacity over the past several years.

National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713, 716 (11th Cir. 1990) (citing S. REP. No. 11, 99th Cong., 1st Sess. 22 (1985)), *modified, reh'g denied*, 942 F.2d 1001 (11th Cir. 1991).

94. Beck, *Buried Alive*, NEWSWEEK, Nov. 27, 1989, at 67.

95. *Id.*

96. *See* Seaburn Inc. v. EPA, 712 F. Supp. 218 (D.D.C. 1989) (explaining that due to the overwhelming response in the notice and comment period the regulations had not been promulgated until 1977); Waste Management v. EPA, 669 F. Supp. 536 (D.D.C. 1987) (stating that even in 1987 the regulations had not been promulgated despite the fact that they had been promised in 1984). *See generally*, Shabecoff, *Burning Toxic Chemicals at Sea Makes Waves on Shore*, N.Y. Times, Dec. 25, 1983, § 4, at 10, col. 1 (discussing the uproar that resulted when the EPA gave tentative permission for incinerator ships to burn hazardous wastes 150 miles offshore).

97. *See* Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981). During the summer of 1978, 211 miles of rural roads in North Carolina were illegally sprayed with PCB contaminated liquid wastes. *Id.* After extensive studies, North Carolina decided to bury the con-

wastes from the existing CERCLA site to an approved disposal facility. At present, every state exports hazardous waste to out-of-state treatment and disposal facilities, with thirty-five states being net exporters of hazardous waste.[98] Only Alaska and Montana do not currently import hazardous waste for treatment or disposal.[99] Fifteen states are net importers of waste.[100] There has thus developed an extensive interstate commerce and trade in hazardous waste.[101]

Many states created their own disposal problems, both in terms of originating the waste and in respect to ultimate disposal. Three examples of heavily industrialized states will illustrate this pattern.

In 1985, California had up to twenty facilities permitted to dispose of hazardous waste in properly constructed landfills and evaporation pools.[102] Three facilities remained by 1990, of which only one could take a full spectrum of hazardous waste.[103] In 1982, there were sixteen treatment and disposal facilities operating in Pennsylvania.[104] Only seven remained open in 1989.[105] Finally, we come to Massachusetts, which enacted a statute a decade ago that allowed the siting of hazardous waste facilities.[106] Not one has been built, and at least five unsuccessful attempts have been made to locate a new facility.[107] In the last instance, $500,000 was spent on legal fees and consulting costs by the impacted communities in fighting the proposal.[108] Massachusetts continues to ship seventy percent of the 200,000 tons of hazardous waste generated there annually out-of-state.[109]

The destinations for much of the nation's hazardous wastes are Alabama, Louisiana, and South Carolina. Louisiana imports over 600,000 tons of waste annually, making it the largest net importer in the United States.[110] Alabama

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taminated soil at an approved landfill. *Id.* The impacted county objected, but its legal objections failed. *Id.*

98. *See Every State Ships Waste Beyond Borders; 48 Receive Some for Management, Study Finds,* 21 Env't. Rep. (BNA) No. 41, at 1800 (Feb. 8, 1991).

99. *Id.*

100. *Id.*

101. *Id.*

102. Moxley, *Lack of New Waste Sites Threaten State's Economic Well-Being,* BUS. J., Sept. 10, 1990, at 7, col. 1.

103. *Id.*

104. Comment, *Local Opposition to Hazardous Waste Facilities in Pennsylvania,* 25 DUQ. L. REV. 299 (1987) (reasoning that strong public opposition is one factor that contributes to the shortage of disposal facilities).

105. *Id.*

106. *See* MASS. GEN. LAWS ANN. ch. 21D, §§ 1-19 (West 1981).

107. Franklin, *Braintree Incinerator Plan Killed,* Boston Globe, Sept. 20, 1990, at 1, col. 1, at 8, col. 5.

108. *Id.* at 8, col. 4.

109. *Id.*

110. In 1987, Louisiana was the country's largest importer of hazardous waste, receiving over 658,000,000 pounds. Almost 79% of the waste came from Arkansas, California, New Jersey, and Oklahoma. *Louisiana Leads in Waste Imports, Study Says,* 20 Env't Rep. (BNA) No. 21, at 867 (Sept. 22, 1989). Louisiana in turn exported only 318 pounds of hazardous waste in 1987. *Id.* Each year, three Massachusetts state agencies, several cities, and over 200 Massachusetts firms

possesses the largest hazardous waste disposal site in the United States at Emelle, Alabama.

Receiver states have responded through outright bans, limited bans, freezes, fees, and taxes. For example, in 1988, Oregon adopted rules that prohibit wastes considered hazardous in the state of origin from being disposed of as solid waste in Oregon.[111] At the time of writing this Article, however, proposals for resolving the hazardous waste disposal problems have reached an impasse around the nation, primarily because of the NIMBY phenomenon.[112]

II. SOLUTIONS

Proponents of a new project should assume substantial opposition will arise. Community opposition is a "given" that must be factored into the planning decision. Failure to anticipate such opposition will often doom the project in advance.[113] It is essential, therefore, to develop a plan that will surmount the

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have shipped thousands of tons of hazardous waste to an incinerator in Louisiana. Tye, *Massachusetts' Waste Problem Becomes Louisiana's*, Boston Globe, Sept. 25, 1989, at 15, col. 1. One Louisiana official stated, "We feel like we've become the dumping ground for the whole country." *Id.*

111. *See State Restricts Disposal as Solid Waste of Material Considered Hazardous in California*, 19 Env't Rep. (BNA) No. 28, at 1436 (Nov. 11, 1988) (noting that the Oregon rule was in part prompted by plans to build an infectious waste incinerator only three miles from the California-Oregon border).

112. Several developments over the past year indicate more fully the difficulty of resolving siting disputes. A representative sample of state developments includes:

A) Nevada's governor imposed an 18-month moratorium on solid waste imports into the state unless covered by an existing agreement. *Governor Imposes 18-Month Moratorium on Importation of Additional Solid Waste*, 21 Env't Rep. (BNA) No. 41, at 1815 (Feb. 8, 1991).

B) Oklahoma enacted legislation that will restrict disposal of residential, commercial, and biomedical waste at sites in the state. Absent a modified permit from the State Department of Health, sites are banned from accepting more than 200 tons per day of solid waste if that waste is generated more than 50 miles from the disposal site. *Governor Signs Bill Restricting Import of Residential Commercial Waste*, 21 Env't Rep. (BNA) No. 6, at 321 (June 8, 1990).

C) South Carolina enacted a statute that limited the amount of waste that can be sent to a commercial landfill in Sumter County from 135,000 tons in 1990 to 110,000 tons by July 1, 1991. *Governor Signs Hazardous Waste Import Bill; Owners of Commercial Landfill Plan Lawsuit*, 21 Env't Rep. (BNA) No. 8, at 367-77 (June 22, 1990).

D) A South Dakota initiative provides that no large-scale solid waste facility can be sited, constructed, or operated in South Dakota unless the legislature approves the facility's request for a solid waste or permit facility. *Disposal Company President Says Initiative Will Effectively Shut Down Lonetree Balefill*, 21 Env't Rep. (BNA) No. 30, at 1401 (Nov. 23, 1990).

E) Texas environmental agencies agreed to Governor Richards' call for a two-year moratorium on permits for new commercial hazardous waste incinerators, cement kilns, and salt dome injection wells. The agencies also agreed to suspend the processing of all new or pending permit applications for treatment, storage, or disposal of hazardous and nonhazardous industrial waste by commercial facilities. Governor Richards stated, "We are getting serious about hazardous waste . . . . No more will hazardous waste facilities be rammed through the permit process, over the objections of local communities. No more will they be located near schools or residential areas or water supplies." *State Agencies Agree to Governor's Call for Two-year Hold On Incinerator Permits*, 21 Env't Rep. (BNA) No. 42, at 1850 (Feb. 15, 1991).

113. *See, e.g.*, Verhovek, *Panel Proposes Paying Towns to Take Waste*, N.Y. Times, Jan. 18, 1991, at B3, col. 6. For example, New York had originally planned to choose the best site for a

expected NIMBY challenge. Realistically, however, no universal solution exists. Nonetheless, any comprehensive plan, whether at a regional, state, national, or international level, which imposes greater risks or costs upon one segment of the community, must address the NIMBY phenomenon if it is to have a chance to succeed. Proponents need to be aggressive in attacking the regulatory and other legal obstacles that will be raised against the project. However, other means should be utilized to avoid regulatory gridlock. A variety of approaches, both legal and nonlegal, should be employed in addressing the expected NIMBY challenge.

A. Nonlegal Solutions

Nonlegal solutions to NIMBYism may be political or educational, and may include citizen involvement and effective use of the media. A general goal is to resolve issues on the basis of scientific evaluation and reason, facts, and logic, rather than emotion, passion, prejudice, and media hysteria. However, hard facts will not, by themselves, overcome hot emotions. Since the NIMBY problem transcends the technical and environmental, and often is of an emotional or political nature, the solution must also address the emotional or political issues. As a starting point, the proposal should, to the greatest extent possible, avoid residential neighborhoods and areas of critical environmental concern.

1. Citizen Involvement and Education

Components of a successful siting process should include: preliminary announcement of studies of the need for the facility, laying out the groundwork, enlisting public and civic leaders in the search for the solution, public education, economic incentives, and involvement of local residents from the start in the planning process. A critical constraint throughout the process is that the developer must maintain an atmosphere of trust and credibility.[114]

The educational component should involve meaningful public involvement from the very beginning of the site selection process. One of the biggest mistakes a proponent of a project can make is to announce at a press conference:

> We are pleased to announce that [West Podunk] has been selected as the site of our new, multimillion dollar, high-technology, solvents recovery center. There will be 350 new jobs created, and a $25 million increase in the property tax base of West Podunk. We have been assured by the experts that no risk exists to the public.

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low-level nuclear waste dump site from a technical standpoint, after conducting the search on purely scientific grounds, even if the surrounding communities were hostile. *Id.* The Low-Level Radioactive Waste Siting Commission subsequently concluded that "imposing such a site on an unwilling community has little or no possibility of success." *Id.* The Commission concluded that incentives were needed to get such sites built. *Id.*

114. Senior executives should personally visit the people living nearest the proposed facility. Paul, *Browning-Ferris Wants New York Towns to Vie for, Not Fight, Proposed Landfill,* Wall St. J., July 20, 1990, at 4B, col. 2.

This announcement is almost guaranteed to arouse the enmity of residents of West Podunk and surrounding communities, while failing to gain substantial support elsewhere. It is foolhardy to believe that a project's benefits, no matter how great, are going to sell the project on the merits in today's world of heightened environmental awareness. Even if there is an initial burst of enthusiasm and public support for the facility, waves of doubt will surface as the community becomes aware of the potential risks involved. A recalcitrant community will not be swayed by an argument that the benefits to society as a whole will outweigh the risks to the community, because the risks are being borne solely by the impacted community. They perceive and receive the risks but do not benefit in kind.

It is also important to recognize that the issue for these communities is not merely one of safety. The problem is also one of "stigma," such that property values may drop and potential customers may stay away if the LULU proceeds. As one businessperson has stated, "Nobody will want to buy a $120,000 condominium if there are drums of toxic waste piled up down the block."[115]

These concerns must be addressed by the project's proponents early on in the process. Thus, a statistical, informational, and safety blitz attesting to the reliability and security of the proposal will not forestall resistance. Prospective opponents may take a little longer to assimilate such information, but organize they will. Project proponents would be wise to keep in mind the perspective of a resident near the Three Mile Island nuclear plant on the prospective restart of the undamaged unit, "I don't care if it's a little bit of harm or ten times that amount—I don't want any . . . all those charts are so much gobbledygook to me . . . ."[116]

Instead, a strong, meaningful, public participation process should be included from the beginning of the decisionmaking process. Public workshops should be extensively utilized.[117] Meaningful citizen involvement is an ideal way to identify and respond effectively to local concerns early in the siting process.[118] The concerns raised by citizens are serious and well intended, and should be addressed as such. Consequently, citizen advisory committees should be formed, involved in the process, and project proponents should listen to them. In addition, some of the public's fears and uncertainties can be allayed by having local community groups review emergency plans, drills, and worker training programs.

One of the components of a successful strategy is to respond to the "what if" question, by pointing out the consequences of "what if we don't do it?" Most specifically, the risks to the health and welfare of the impacted community if the project does not proceed should be emphasized. It is also important

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115. Alsop, *Widespread Fear of Hazardous Waste Sites Thwarts State and Industry Disposal Plans*, Wall St. J., Mar. 10, 1983, at 33, col. 4.

116. Springfield Morning Union, Mar. 29, 1983 at 3, col. 3.

117. *See* Davis, *Approaches to the Regulation of Hazardous Waste*, 18 ENVTL. L. 505, 518 (1988) (suggesting a series of two workshops, the first informational and the second adversarial).

118. *See* Crim, *supra* note 10, at 132, 134, 135.

throughout the process to point to successful facilities elsewhere. While such successes will not, by themselves, sell a new project, the lessons learned elsewhere will help to insure the safety of the project and thereby alleviate some concerns. An additional strategy to minimize the risk to the impacted community and the threat to property values, in some situations, is for the proponent to offer to buy up a buffer zone around the project,[119] and otherwise guarantee property values.[120]

Zero-risk is an unachievable goal; there can be no guarantees of absolute safety in an imperfect world.[121] However, if a project proponent meaningfully involves the public, explores alternatives, responds to questions raised, details safety measures at the plant and from elsewhere around the world, and even modifies designs to reduce community impacts and the risks posed to the community, the level of risk may often times be reduced to an "acceptable" level for the community.

Of course, there is a more Machiavelian approach to garner community support and overcome the NIMBY phenomenon. For example, a project proponent could announce that it is searching for the appropriate location for a new solvents recovery center somewhere in the state of Ecotopia. After the announcement, the proponent of the project would conduct a search for the best location according to detailed criteria. Through a process of elimination the list of potential sites would reduce itself to a group of semifinalists, then finalists, and ultimately, the selected site. In this way, when the final selection is made, the other communities, relieved at not housing the facility, would politically support the selection.

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119. For example, several petro-chemical companies in Louisiana are buying up tracts of land around their plants as a buffer zone. Schneider, *Chemical Plants Buy up Neighbors for Safety Zone*, N.Y. Times, Nov. 28, 1990, at A1, col. 1.

120. Champion International guaranteed property values of anyone living within two miles of a planned landfill in Riley Township, Ohio. *Financial Guarantees Fight NIMBY Syndrome*, Wall St. J., Feb. 7, 1991, at B1, col. 1.

121. *See, e.g.*, Kellman, *Anxiety over the TMI Accident: An Essay on NEPA's Limits of Inquiry*, 51 GEO. WASH. L. REV. 219, 247 (1983). "In March 1979, an event with a statistically insignificant probability of occurring did occur. History is full of instances where the improbable occurred. Arguably, law should be as responsive to the lessons of history as to the calculations of technical experts." *Id.*

In a dissenting opinion in a case involving the transportation of nuclear waste materials, Judge Oakes pointed out:

> "Worst-case" accidents have a way of occurring—from Texas City to the Hyatt Regency at Kansas City, from the Tacoma Bridge to the Greenwich, Connecticut I-95 bridge, from the Beverly Hills in Southgate, Kentucky to the Cocoanut Grove in Boston, Massachusetts, and from the Titanic to the DC-10 at Chicago to the I-95 toll booth crash and fire—and that alone would end the case for many.

City of New York v. United States Dep't of Transp., 715 F.2d 732, 753 (2d Cir.) (Oakes, J., dissenting), *cert. denied*, 465 U.S. 1055 (1984). *See generally* Binder, *NEPA, NIMBYs and New Technology*, 25 LAND & WATER L. REV. 11 (1990) (discussing NEPA and addressing the risks inherent in new technologies).

2. The Media

One of the major issues that needs to be addressed in resolving the NIMBY problem is the role of the media. The media responds, of course, to the dramatic. If someone says that Chicken Little is falling, then that is worth attention. If, however, the report is that Chicken Little is still healthy after 415 days, then that statement is not worth coverage. In other words, apocalyptic views get prompt media attention.[122] If the statement is repeated often enough, then the public comes to believe it fervently. Denials and refutations do not receive the same attention.

A media scare is the modern version of the Depression-era run on the bank. Once the news is out, everyone scrambles to protect whatever they have. Consequently, what were once purely local or regional disputes may become a national panic in the glare of media attention. When repeated often enough, the fears acquire a truth and validity of their own in the public eye. Official reaction then ensues. For example, an EPA-commissioned study reported chromosome abnormalities in residents of Love Canal.[123] The report was formally communicated to the EPA on May 15, 1980.[124] It was on the front page of the New York Times on May 17, and on May 21 President Carter announced a decision to evacuate 700 families from their homes near Love Canal.[125] Love Canal has, of course, acquired a notoriety of its own.

Subsequently, technical review and follow-ups of the study found major methodological flaws with the original study.[126] In addition, no excess chromosome abnormalities of any sort were found.[127]

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122. For example, a scientific paper noted how faulty population-health studies are misleading both the public and physicians about the risks of daily living. Feinstein, *Scientific Standards in Epidemiological Studies of the Menace of Daily Life*, 242 SCIENCE 1257 (Dec. 2, 1988). Three studies, when released, erroneously alarmed the public by claiming some aspect of daily life posed a health risk; to wit, the tranquilizer reserpine was linked to breast cancer, coffee drinking to cancer of the pancreas, and alcohol use to breast cancer. *Id.* at 1261.

> The episodes have now developed a familiar pattern. A report appears in a prominent medical journal; the conclusions receive wide publicity by newspapers, television, and other media; and another common entity of daily life becomes "indicted" as a "menace" to health—possibly causing strokes, heart attacks, birth defects, cancer.

Id. at 1257.

123. Kolata, *Love Canal: False Alarm Caused By Botched Study*, 208 SCIENCE 1239, 1239 (June 13, 1990).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* Havender, *Once Again, Conclusive Evidence the Sky Is Falling*, Wall St. J., Nov. 3, 1983, at 30, col. 3. Another study found no elevated risks of cancer for residents near Love Canal. Janerich, Burnett, Feck, Hoff, Nasca, Polednak, Greenwald & Vianna, *Cancer Incidence in the Love Canal Area*, 212 SCIENCE 1404 (June 19, 1981).

A study sponsored by the Centers for Disease Control, Brookhaven National Laboratory, and Oak Ridge National Laboratory found that people who lived close to the chemical dump at Love Canal have not shown an increased incidence of chromosome damage when compared to other persons living in the Niagara Falls, New York area. The study said that even if chromosome damage had been found, it would be impossible to know whether such damage might foretell later

Recently, the media, including a presentation on CBS's popular *60 Minutes*, featured problems with standard amalgam dental fillings, which contain mercury.[128] Mercury can escape from the fillings, and has been blamed for various problems including headaches and multiple sclerosis. Patients flooded back to their dentists to have their amalgam fillings replaced. Yet, there have been numerous studies which fail to make any solid connection between human illness and mercury fillings.[129]

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occurrence of chemical illness. CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH & HUMAN SERVS., CYTOGENETIC PATTERNS IN PERSONS LIVING NEAR LOVE CANAL-NEW YORK, 32 MORBIDITY & MORALITY WEEKLY REPORT NO. 20, at 261, 262 (May 27, 1983).

At about the same time, however, the Office of Technology Assessment ("OTA") issued a report that questioned an opinion that the Department of Health and Human Services had issued in early 1982. The earlier opinion concluded that an area near Love Canal would be habitable if safeguards against canal leakage were imposed. The OTA study concluded that "[w]ith available information it is not possible to conclude either that unsafe levels of toxic contamination exist or that they do not exist." OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, HABITABILITY OF THE LOVE CANAL AREA: AN ANALYSIS OF THE TECHNICAL BASIS FOR THE DECISION ON THE HABITABILITY OF THE EMERGENCY DECLARATION AREA 3 (June 1983). The OTA assessment was based on several factors, including the uneven sampling of soils, an inadequate number of soil samples, inadequate controls, and wide variability in performance by the contract laboratories.

A subsequent study of field mice (meadow voles) in and around the Love Canal area found that voles living near Love Canal had a reduced life expectancy, as compared with a control group living a mile away. Generally, the study showed that the closer the voles were to Love Canal, the younger they were dying. The scientists who conducted the study observed signs of liver damage due to the absorption of a wide variety of toxic compounds. *See* Christian, *Love Canal's Unhealthy Voles*, 16 NAT. HIST. 12-14 (Oct. 1983).

Another study by the Childrens Hospital of Oakland, California found that children living near Love Canal experienced low birth weights, below normal growth levels, and a variety of health problems. *Studies Show Conflicting Health Views of Residents Exposed to Love Canal Site*, 14 Env't Rep. (BNA) 128 (May 27, 1983); Polan & Vianna, *Incidence of Low Birth Weight Love Canal Residents*, 226 SCIENCE 1217 (Dec. 7, 1984).

When the Center for Disease Control study was released, the woman who had led the fight to evacuate 1000 families in 1980 said the new study "was released deliberately to confuse and cause a smoke screen around the canal in efforts to revitalize the area." N.Y. Times, May 22, 1983, § 4, at 8, col. 6. Obviously, not everyone was pleased, relieved or gratified by the study. Such a reaction may or may not be reasonable in light of the vast unknowns, coupled with a widespread distrust of government.

These studies are but a recent sample of many of the studies of Love Canal, which may well be the most intensively studied toxic waste dump. Even so, since there is so little that we know, clearly we are dealing with the limits of technology assessment. It seems that each study is valid only until the next one is issued. In a sense, the scenario is analogous to the famous Abbott and Costello routine, "Who's on First," but the consequences are tragic—not farcical. The unknowns are almost infinite and understandably frightening. It may be true, as President Roosevelt said in his inaugural address, that "[t]he only thing to fear is fear itself." But convincing the public that there is nothing to fear vis-a-vis toxic substances, toxic waste dumps, radiation, and the like is asking the impossible.

128. Begley & Rosenberg, *What to Do with a Mouthful of Mercury?*, NEWSWEEK, Jan. 14, 1991, at 45; *see* Lehman, *Putting to Rest the Mercury Fillings Flap*, Boston Globe, Jan. 7, 1991, at 33, col. 4.

129. Lehman, *supra* note 128, at 36, col. 5. In fact, dentists exposed to mercury at work and through fillings in their own teeth do not have higher levels of multiple sclerosis, arthritis or other chronic diseases than the general public. *Id.* at 60, col. 1.

Responsible media coverage is needed. Instead of immediately speculating on the potential risks involved in a proposal, and blowing the risks out of proportion, editors should require reporters to investigate the factual basis of the claims before leading off the 6:00 p.m. news with a parade of horrors. As a major component of a successful siting plan, the proponents should provide objective information to the media from the beginning of the process, as well as keeping reporters constantly apprised of developments.

B. Legal Solutions

1. Judicial Response

The response to the NIMBY phenomenon must also involve a change in perspective by the judiciary. In the 1970s and 1980s, the courts played vital roles in aggressively protecting environmental values. Certainly, the environmental record of the agencies was spotty.[130] However, the balance has swung so far toward environmental protection that the courts now have to recognize the competing values of society. Courts must, of course, continue to be vigilant in protecting environmental values, but they must also recognize that not every claim of environmental injury warrants judicial intervention. Courts have to distinguish substantial risks from minimal risks. We need to recognize that not every tree should be saved, scenic vista preserved, or stone left unturned. Every project, every proposal, every site will have environmental consequences in a broad sense. However, not every proposal should be blocked. Instead, a sense of proportion is needed. Only a substantial change in existing political and judicial mores will dramatically cut the NIMBian Knot. At some point, courts have to say "enough is enough," recognize that the broad societal need for certain projects outweighs the adverse environmental impacts, and see

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130. For example, in the epochal struggle over the proposed Storm King Mountain pumped-storage facility on the Hudson River 100 miles above New York City, the Federal Power Commission wrote:

> Just as the mountain has swallowed the scar of the highway, the intrusive railroad structures and fills, and tolerates both the barges and scows which pass by it, and the thoughtless humans who visit it without seeing it, so it will swallow the structures which will serve the needs of people for electric power.

In re Consolidated Edison Co., 85 P.U.R.3d 129, 138-39 (1970), *aff'd sub nom.*, Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). Chairman Nassikas of the Federal Power Commission subsequently stated, "I'm a conservationist too," but added that his agency's first mission is to encourage "an abundant supply of electric energy throughout the United States." N.Y. Times, Apr. 11, 1973, at 19, col. 1; *see also* Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (holding that agencies must balance economic concerns with environmental factors when considering applications for construction permits), *disapproved by* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (stating that when exercising its sovereign power to allocate water resources in the public interest, the state is not bound by prior allocation decisions may be inconsistent with current needs), *cert. denied*, 464 U.S. 977 (1983).

through the tactics of NIMBian delay for what they are.

A series of cases involving a toxic waste landfill in Wilsonville, Illinois, illustrates the need for a changed perspective.[131] The landfill involved was located on 130 acres of land in and adjacent to the southern border of the Village of Wilsonville.[132] Farmland surrounded the landfill on three sides.[133] Much of the site and surrounding area was located above an abandoned coal mine.[134] Seventy-three water wells existed in the village at the time.[135] Materials buried at the site included PCBs, cyanide, asbestos, pesticides, mercury, and arsenic.[136]

The facility was duly licensed and regulated by the Illinois Environmental Protection Agency ("IEPA").[137] The United States Environmental Protection Agency attested to the need for the use of the landfill.[138] Each delivery of waste material to the site had to be accompanied by a supplemental permit issued by IEPA.[139] One hundred eighty-five permits for each separate waste to be disposed of in the site were thereby obtained before operations commenced.[140] There was no showing of present leakage or other danger, but the possibility existed of some leakage in the future.[141]

The plaintiffs included the Village of Wilsonville, the County of Macoupin, and the Illinois Attorney General.[142] All sought injunctive relief on the com-

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131. *See* Village of Wilsonville v. Earthline Corp., 11 Env't Rep. Cas. (BNA) 2137 (Ill. Cir. Ct. 1978), *aff'd sub nom.* Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 396 N.E.2d 552 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981). *See generally* Note, *Environmental Law/ Nuisance*, 70 ILL. B.J. 586 (1982) (discussing the *Wilsonville* case).

132. Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 622, 396 N.E.2d 552, 554 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

133. *Id.*

134. *Id.* Underlying the mine spoil were soil strata of tight clay. The top strata extended to a depth of 10 to 12 feet, followed by a thin, noncontinuous, permeable layer of saturated clay, underlain by a strata of tight clay for an additional depth of more than 10 feet. *Id.* at 628, 396 N.E.2d at 561. The defendant had dug trenches in the clay to a depth of 10 to 12 feet, a width of 50 feet, and varying from 75 to 350 feet in length. *Id.* Ten feet separated the trenches. *Id.* Hazardous substances were placed in the trenches and covered. *Id.* By the time of trial seven trenches had been dug; three had been completely filled, and two were partially filled. *Id.*

135. *Id.* at 623, 396 N.E.2d at 555.

136. Village of Wilsonville v. SCA Servs., 86 Ill. 2d 1, 9, 426 N.E.2d 824, 828 (1981).

137. Significantly, Illinois had earlier held that the state had statutorily preempted local government control of sanitary landfills. *See* Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972). After this hazardous waste landfill opened, Illinois changed its statutes to require county board approval before a site can begin operations. *See* ILL. ANN. STAT. ch. 111½, para. 1039(c) (Smith-Hurd 1990-91)

138. The EPA filed an amicus curiae brief in the case. Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 621, 396 N.E.2d 552, 553 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

139. *Id.* at 623, 396 N.E.2d at 555.

140. *Id.*

141. *Id.* at 628, 396 N.E.2d at 561.

142. *Id.* at 621, 396 N.E.2d at 554. Apparently the facility was operating for five months when the town learned of a shipment of PCB-contaminated soil to the site. A parish priest told parishioners in his Sunday sermon that they were endangered by the facility. The local citizens formed an unruly mob by the evening. *See* Note, *Enhancing the Community's Role in Landfill Siting in*

mon law theory of nuisance. The County and the Attorney General also sought to abate violations of the Illinois Environmental Protection Act.[143] The trial court concluded that the site constituted a nuisance and enjoined continued operation of the landfill.[144] The court ordered removal of all toxic wastes buried there, along with any contaminated dirt, and restoration and reclamation of the site area.[145] It found that the defendant's operation constituted both a public and private nuisance.[146]

The nuisance finding was based on evidence of dust and odors emitted from the site, transportation of hazardous materials through the village en route to the site, and ultimate air and water pollution from the burial of hazardous materials at the site.[147] Evidence also existed of spills from the toxic waste trucks traveling through Wilsonville.[148]

The major factual dispute was the possibility that hazardous substances would migrate from their burial sites into the groundwater system.[149] The risk also included subsidence caused from the underground coal mines.[150] The opposing expert witnesses disagreed substantially as to the nature of the risks, including the rate of subsidence, explosive interactions, and leaking.[151] For example, one witness for the plaintiffs testified "that if sufficient oxygen could reach the buried chemicals, and he believed that it could, then an explosive interaction of unknown date of occurrence, magnitude, and duration is likely."[152] The appellate tribunal affirmed the trial court's finding for the plaintiff, stating:

> In the case before us, evidence that hazardous substances would actually migrate out of the landfill and contaminate outside areas was, at best, uncertain, contingent upon the existence of conditions in the subsurface which were not known and also contingent upon the occurrence of future happenings in regard to subsidence or accidental contact between substances. Considering the length of time required to contain the substances in the landfill

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Illinois, 1987 U. ILL. L. REV. 97, 97 n.3, (citing U.S. EPA, SITING OF HAZARDOUS WASTE MANAGEMENT FACILITIES AND PUBLIC OPPOSITION 303-16 (Executive Summary 1979)). In addition, "local officials, including the prosecuting state's attorney, and the circuit judge who presided at the trial, were seeking reelection and retention, respectively." Note, *supra* note 131, at 588.

143. *Wilsonville*, 77 Ill. App. 3d at 621, 396 N.E.2d at 554.

144. Village of Wilsonville v. Earthline Corp., 11 Env't Rep. Cas. (BNA) 2137 (Ill. Cir. Ct. 1978), *aff'd sub nom.* Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 396 N.E.2d 552, *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

145. *Id.* at 2149.

146. *Id.*

147. Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 627, 396 N.E.2d 552, 557 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

148. *But see id.* at 628, 396 N.E.2d at 558 (stating that the defendant presented evidence that trucks containing agricultural chemicals having a greater acute toxicity than PCBs routinely transported through town).

149. *Id.*

150. *Id.*

151. *Id.* at 628-29, 396 N.E.2d at 559.

152. Village of Wilsonville v. SCA Servs., 86 Ill. 2d 1, 12, 426 N.E.2d 824, 830 (1981).

> because of their toxicity, however, we conclude that the trier of fact could have determined that there was a reasonable likelihood that escape would take place sometime in the future.[153]

The appellate opinion then emphasized the potential risks. The court cited the Restatement of Torts to the effect that the more serious the impending harm, the less justification there need be for taking the chances that are involved in pronouncing the harm too remote.[154] In fact, the court stated:

> The trial court could have determined from the evidence that the harm that would impend because of the danger that hazardous substances might escape was so serious that no justification existed to deny the injunction even though the feared harm was uncertain as to occurrence and, in any event, unlikely to occur until the distant future.[155]

The court of appeals agreed that to balance the equities would have been inappropriate in this case because the "extremely serious nature of the possible harm" overrode the fact that it was remote.[156]

In taking the case to the Illinois Supreme Court, the defendant argued that courts should require a showing of a substantial risk of certain and extreme future harm before issuing an injunction.[157] The defendant urged the court to define this standard in terms of a "dangerous probability" that the threatened or potential injury would occur.[158]

The Illinois Supreme Court cited Dean Prosser for the proposition that an injunction may issue when it is highly probable that the activity will lead to a nuisance.[159] The court stated that there is no need to wait until the injury occurs before relief is granted.[160] The court found it highly probable that an escape from the chemical waste-deposit site would bring about a substantial injury.[161] The Illinois Supreme Court deferred, as normal, to the findings of

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153. Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 634-35, 396 N.E.2d 552, 563 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

154. *Id.* at 635-36, 396 N.E.2d at 563-64 (citing RESTATEMENT (SECOND) OF TORTS § 933 comment on subsection (1) (1977)).

155. *Id.*, 396 N.E.2d at 564.

156. *Id.* at 638, 396 N.E.2d at 565.

157. Village of Wilsonville v. SCA Servs., 86 Ill. 2d 1, 25, 426 N.E.2d 824, 836 (1981).

158. *Id.*

159. *Id.* at 26, 426 N.E.2d at 836 (citing D. PROSSER, PROSSER ON TORTS 603 (4th ed. 1971)).

160. *Id.* at 27, 426 N.E.2d at 837.

161. *Id.* The court stated:

> [W]e think it is sufficiently clear that it is highly probable that the instant site will constitute a public nuisance if, through either an explosive interaction, migration, subsidence, or the "bottleneck effect," the highly toxic chemical wastes deposited at the site escape and contaminate the air, water, or ground around the site. That such an event will occur was positively attested to by several expert witnesses. A court does not have to wait for it to happen before it can enjoin such a result. Additionally, the fact is that the condition of a nuisance is already present at the site due to the location of the site and the manner in which it has been operated. Under these circumstances, if a court can prevent any damage from occurring, it should do so.

fact made by the trial court.[162]

For the court, the gist of the case was "that the defendant is engaged in an extremely hazardous undertaking at an unsuitable location, which seriously and imminently poses a threat to the public health."[163] The court recognized the need for such facilities, but emphasized that they "must be located in a secure place, where it will pose no threat to health or life, now, or in the future."[164] In other words, the Illinois courts succumbed to the "what if" scenario, and demanded the impossible—a zero-risk solution.

The case epitomizes judicial acceptance of the "what if" scenario. The parade of horrors was sufficiently great, and the testimony of plaintiffs' experts sufficiently credible, that the courts in effect second-guessed the regulatory agencies otherwise charged with assessing risks and safety.[165] *Wilsonville* represents the first time that a state-permitted landfill had been ordered shut down and its chemicals removed. This type of judicial response costs society greatly, as seen by the lack of available disposal sites.[166] The costs to the defendant in *Wilsonville* were also great, including $24.5 million to close the site,[167] and $2.5 million to settle a private lawsuit.[168]

While the *Wilsonville* litigation has been followed on occasion,[169] a contrary judicial motif for resolving the NIMBY problem is developing. This motif primarily arises through the commerce clause, preemption doctrine, and equitable relief, particularly in the context of nuisance law and impact statement analysis.

2. *The Commerce Clause*

One major legal avenue of attack on NIMBYism has been the commerce clause. For our purposes, the two major cases are *City of Philadelphia v. New*

Id.

162. *Id.* at 15, 426 N.E.2d at 831.

163. *Id.* at 30, 426 N.E.2d at 838.

164. *Id.* at 31, 426 N.E.2d at 838.

165. *See supra* notes 137-40 and accompanying text.

166. The appellate decision recognized the undeniable need for hazardous disposal sites and the possibility for illegal disposal in the absence of approved disposal sites. These illegal disposals could pose a far greater danger than any resulting from the Wilsonville landfill. Village of Wilsonville v. SCA Servs., 77 Ill. App. 3d 618, 636, 396 N.E.2d 552, 564 (1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

167. Boston Globe, June 24, 1982, at 25, col. 4.

168. N.Y. Times, June 26, 1987, at A23, col. 3.

169. *Cf.* Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984) (holding that the evidence established that the landfill involved was a public nuisance because of its proximity to residential areas and a primary water source); Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985) (holding that a local ordinance which banned hazardous waste disposal in the city did not violate substantive due process, nor was it preempted by RCRA), *appeal dismissed*, 474 U.S. 1098 (1986); *see also* Fondessy Enter. v. City of Oregon, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986) (holding that a municipal ordinance that imposed permit fee and recordkeeping requirements gave the city authority to enforce monitoring of hazardous waste facilities inside the city's corporate limits).

Jersey[170] and *Sporhase v. Nebraska*.[171]

The parameters of *City of Philadelphia v. New Jersey* are, of course, well known. New Jersey attempted to prolong the life of its dumps by essentially banning imported trash that lacked commercial value in New Jersey.[172] The Supreme Court held that all objects of interstate trade merit commerce clause protection, thereby including garbage and hazardous wastes within the protective environs of the commerce clause.[173]

A critical passage in *City of Philadelphia* reads as follows:

> [W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's border. . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*[174]

Therefore, the critical question is whether the bill is essentially a protectionist measure, or whether it is based on legitimate local concerns with only incidental effects on interstate commerce. A rule of per se invalidity applies when the purpose is simple economic protectionism. In other words, are we protecting the free flow of commerce against the actions of individual states, which would otherwise lead to economic balkanization of the fifty states?

The New Jersey statute at issue in *City of Philadelphia* was clearly an act of economic protectionism because it distinguished between in-state and out-of-state garbage on the basis of origin even though New Jersey was unable to show any qualitative difference in the garbage based upon the state of origin. The Court acknowledged that New Jersey could stop the flow of all garbage, but not by singling out sources from out of state: "it may be assumed as well that New Jersey may pursue the ends [of environmental protection] by slowing the flow of all waste into the state's remaining landfills, even though interstate commerce may be affected."[175] In this respect, the key to invalidating the New Jersey statute was the attempt by one state to isolate itself from a prob-

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170. 437 U.S. 617 (1978).

171. 458 U.S. 941 (1982).

172. *City of Philadelphia*, 437 U.S. at 618-19.

173. *Id.* at 622.

174. *Id.* at 624 (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)). The *Pike* court had stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

175. City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

lem common to many, by erecting a barrier against the movement of interstate trade. Thus, the Court expressed strong concerns about state attempts to slow or freeze interstate commerce for protectionist reasons.[176] By contrast, there are valid nondiscriminatory statutes that are designed to alleviate environmental problems, such as bans on phosphate detergent regardless of the state of origin.[177]

It is, of course, ironic that Pennsylvania, which sought to open New Jersey's border in *City of Philadelphia v. New Jersey,* is now attempting to close its borders.[178] In his concluding passage in the case, Justice Stewart had some prescient thoughts about the commerce clause:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal and New Jersey claims the right to close its borders to such traffic. Tomorrow cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.[179]

A critical question expressly left open by the case relates to publicly owned facilities. In a footnote in *City of Philadelphia,* the Court stated, "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources."[180] Several states and communities have taken advantage of this possible loophole by controlling access to publicly owned facilities. Pursuant to the unanswered question, some opinions have upheld bans on foreign garbage in publicly owned landfills.[181]

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176. *See also* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). In *Hughes,* the Court struck down a state statute that prohibited the export of minnows, holding that "facial discrimination by itself may be a fatal defect, regardless of the State's purpose." *Id.* at 337.

177. *See infra* note 223 and accompanying text.

178. *See supra* notes 89-91 and accompanying text (discussing Pennsylvania's two-year moratorium on landfill construction or expansion).

179. *City of Philadelphia,* 437 U.S. at 629.

180. *Id.* at 627 n.6. In a subsequent case, the Court upheld a South Dakota State Court Commission decision to confine cement sales from the state-owned plant to South Dakota residents in a time of a cement shortage. Reeves, Inc. v. Stake, 447 U.S. 429 (1980). *See generally* Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly,* 1984 S. ILL. U.L.J. 73 (discussing the impact of *Reeves* on the proprietary exception to the dormant commerce clause).

181. *See* Lefrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987); Evergreen Waste Sys. v. Metropolitan Serv. Dist., 643 F. Supp. 127 (D. Or. 1986), *aff'd on other grounds,* 820 F.2d 1482 (9th Cir. 1987).

A variation is to limit garbage disposal at a county dump to sources generated in the county. Swin Resource Sys. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 1127 (1990); Hancock Indus. v. Schaeffer, 811 F.2d 225 (3d Cir. 1987); Waste Aid Sys. v. Citrus County, 613 F. Supp. 102 (M.D. Fla. 1985). *Contra* Diamond Waste v. Monroe County, 731 F. Supp. 505 (M.D. Ga. 1990) (holding that Georgia statute governing the transportation of waste violated the commerce clause).

One of the premises we should keep in mind as an outgrowth of *City of Philadelphia v. New Jersey* is the need to avoid a crazy-quilt pattern of local regulations, particularly when the underlying motivation is NIMBYism. Consequently, local licensing fees for transporters have been struck down, since the cumulative effects of each town, city, or county imposing fees and different licensing requirements on transportation would severely impact interstate commerce.[182] Examples of such burdensome local regulations might include a county ordinance which absolutely prohibits the transportation through and disposal of hazardous waste in the county from outside the county, or a separate requirement of a license to transport hazardous waste through the county, with a separate certificate for radioactive material. Thus, Maryland held, pursuant to the commerce clause, that the regulation of hazardous wastes moving in interstate commerce is not a subject admitting of a "diversity of treatment" so as to enable every county to enact its own rules.[183]

The Supreme Court has acknowledged that safety measures carry a strong presumption of legitimacy, but even nondiscriminatory local safety measures that place an unconstitutional burden on interstate commerce may be struck down.[184] One major result of *City of Philadelphia v. New Jersey* is that the adoption of outright bans on interstate commerce has diminished. Strict bans have been struck down.[185] Instead, states and communities are getting creative in trying to skirt the parameters of the case, such as by enacting reciprocity statutes.[186]

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182. Local regulation of hazardous waste transportation illustrates the inconsistency and irrationality of regulations that are based upon perceived risk rather than actual risk. It is estimated that shipments of hazardous wastes account for less than three percent of all hazardous materials shipped in the United States. Between 1975 and 1985, there was an average of 1,750 reportable accidents per year involving cargo tank trucks carrying hazardous materials. Only 321 of these resulted in accident-related releases of hazardous materials. Sixty-nine percent of this number, in turn, involved gasoline or oil products. Crim, *supra* note 10, at 132, 137.

183. Browning-Ferris, Inc. v. Anne Arundel County, 292 Md. 136, 147-48, 438 A.2d 269, 274-78 (1981); *see also* Union Pac. R.R. v. Las Vegas, 747 F. Supp. 1402 (D. Nev. 1989) (holding that a Las Vegas hazardous materials transportation ordinance was preempted by the Federal Hazardous Materials Transportation Act and unconstitutional under the commerce and due process clauses).

184. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (declaring an Illinois statute that required a specified type of mudguards on trucks invalid since it unduly and unreasonably burdened interstate commerce).

185. *See, e.g.*, Industrial Maintenance Serv. v. Moore, 677 F. Supp. 436 (S.D. W. Va. 1987) (holding that solid waste is an item of interstate commerce protected by the commerce clause when it is transported across state lines); Shayne Bros. v. Prince George's County, 556 F. Supp. 182 (D. Md. 1983) (holding that an ordinance that prohibited the use of local landfill by out-of-state interests violated the interstate commerce clause); Dutchess Sanitation, Inc. v. Town of Plattekill, 51 N.Y.2d 670, 417 N:E.2d 74, 435 N.Y.S.2d 962 (1980) (holding that a town ordinance that forbade out-of-town parties from disposing of rubbish in town, violated the commerce clause).

186. An Indiana statute, for example, required a driver who was transporting out-of-state waste to present the landfill operator with a document from a health officer from the foreign state certifying that the solid waste did not contain any hazardous waste in violation of federal law, or any infectious waste in violation of Indiana law. IND. CODE ANN. § 13-7-22-2.7(c)(2) (Burns 1990). In addition, a higher tippage fee was assessed against out-of-state waste. *Id.* § 13-9.5-5-1. The fee

In this respect, the major case is *Sporhase v. Nebraska.*[187] In *Sporhase,* the Court struck down a Nebraska statute which permitted the export of water only to states with a reciprocal agreement with Nebraska.[188] The facts were somewhat unique in that the appellants owned contiguous tracts of land in Colorado and Nebraska.[189] The land was irrigated by a well in Nebraska.[190] The appellants did not obtain the requisite permit from Nebraska to transfer ground water out-of-state.[191] Colorado did not allow water exports to Nebraska, so a Nebraska permit could not issue under Nebraska law.[192] Nebraska sought to enjoin the appellants from further diversions.[193]

Sporhase held that water was a subject of interstate commerce,[194] overruling an older case, *Hudson County Water Co. v. McCarter,*[195] which had held that states could embargo water at their discretion.[196] The *Sporhase* Court again applied the standard formulation, which was reaffirmed in *City of Philadelphia v. New Jersey.*[197] The Court thus held that a state may not limit water exports merely to protect local economic interests.[198]

The Court further recognized that the conservation and preservation of diminishing sources of ground water is an unquestionably legitimate and highly important purpose.[199] The Court accepted the validity of the first three conditions for the withdrawal of water for an interstate transfer: 1) that the requested withdrawal was reasonable, 2) that it was not contrary to the conservation and use of ground water, and 3) that it was not otherwise detrimental to the public welfare.[200] As the Court noted, a state that "imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."[201] In such a situation, the suspect discrimination against interstate commerce may be lacking.[202]

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was equal to the difference between the cost of dumping the trash in the landfill closest to the source of the trash and the cost charged by the Indiana landfill operator. *Id.* The statute would have the effect, to a large extent, of discouraging the importation of trash into Indiana due to its provisions for increased transportation costs. The statute, however, was recently struck down by a federal district court based on a violation of the commerce clause. *See* Government Suppliers Consolidating Servs. v. Bayh, 753 F. Supp. 739 (S.D. Ind. 1990).

187. 458 U.S. 941 (1982).
188. *Id.* at 960.
189. *Id.* at 944.
190. *Id.*
191. *Id.*
192. *Id.* at 957.
193. *Id.*
194. *Id.* at 953-54.
195. 209 U.S. 349 (1908).
196. *Id.* at 357.
197. 437 U.S. 617 (1978); *see supra* note 174 and accompanying text.
198. Sporhase v. Nebraska, 458 U.S. 941, 956 (1982).
199. *Id.*
200. *Id.* at 955.
201. *Id.* at 955-56.
202. *Id.*

The Court also gave states some power to protect the health of their citizens, such that a state could restrict water exports under certain circumstances in times and places of shortage:[203]

> If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision.[204]

The Court acknowledged, therefore, that it would defer to some discriminatory export restrictions, and would uphold a reciprocity requirement that was narrowly tailored to the state's legitimate conservation and preservation intent.[205] "Narrowly tailored" would entail "a close means-end relationship."[206] The state would bear the burden of demonstrating the requisite close fit between the purpose and means used, such as a reciprocity requirement.[207]

For us, the significance of *Sporhase* lies not in its treatment of water as an object of interstate commerce; rather, *Sporhase* is significant for its invalidation of the reciprocity clause provision. The reciprocity clause was discriminatory on its face since it banned all water exports to Colorado. Such a facially discriminatory measure will receive the "strictest scrutiny" by the Court. The provision must thereby have a "close fit" with its avowed purpose if it is to survive a constitutional challenge. The Nebraska statute failed because the reciprocity requirement was an explicit barrier to interstate commerce. The requirement was not narrowly tailored to serve the avowed purposes of conservation and preservation.[208]

Reciprocity statutes have become common in that imports from other states will be allowed into the receiving state only if the state of origin has enacted substantially similar standards for controlling industrial waste disposal. Pursuant to *Sporhase*, however, these restrictions have frequently been struck down.[209]

Sporhase was directly followed by a recent case involving Alabama's Emelle facility.[210] Alabama's Holley Bill prohibited commercial waste management facilities from accepting hazardous wastes generated outside Alabama unless the exporting states met certain statutory requirements, which included pre-

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203. *Id.* at 956.

204. *Id.* at 958.

205. *Id.* at 957-58.

206. *Id.* at 958.

207. *Id.* at 957.

208. *Id.*

209. *See* Oklahoma State Dep't of Health v. Lamberton, 582 F.2d 1267 (10th Cir. 1978); Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978).

210. National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713 (11th Cir. 1990), *modified, reh'g denied*, 924 F.2d 1001 (1991).

treatment and preapproval of the exporting state generators by Alabama.[211] The Holley Bill prohibited the owner or operator of a commercial hazardous waste management facility in Alabama from treating or disposing of hazardous wastes generated in a state other than Alabama, if the other state either (1) prohibited the treatment or disposal of hazardous waste within its borders and had no facility for such, or (2) had no existing facility for treating or disposing of hazardous waste and had not entered into an interstate or regional agreement, to which Alabama was also a signatory, for disposing of its wastes.[212] The Holley Bill also prohibited commercial waste management facilities in Alabama from contracting with a state other than Alabama to satisfy the other state's capacity assurance obligation.[213]

One problem with the Alabama statute was that, assuming it was related to health and safety, it did not ban the shipment of all hazardous wastes into the state based upon characteristics of the wastes. Instead, only shipments from certain states were banned, based upon the state of origin. As stated in *City of Philadelphia,* that purpose "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[214] The Alabama measure did not distinguish on the basis of the type of waste, or degree of dangerousness, but on the basis of the state of generation. Therefore, it facially discriminated against interstate commerce.

At first blush, reciprocity statutes smack of economic protectionism. However, they may well be the best means to resolve the siting disputes. There is no question that by using state and local health and safety measures, Alabama, Louisiana, and South Carolina could simply close their facilities. Undoubtedly every landfill can be found in violation of some health and safety requirement. Perfection, including compliance with statutes, is impossible in a human society. We must realize, therefore, that Alabama could always close the Emelle facility through a combination of taxes[215] and rigorous enforcement of health and safety statutes. Consequently, a state can use a history of violations against a facility, such as a landfill, to force it to close.[216] So long as the state does not discriminate between in-state and out-of-state waste, it can

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211. *Id.* at 715.

212. *Id.* at 717.

213. *Id.*

214. City of Philadelphia v. New Jersey, 437 U.S. 617, 626-67 (1978).

215. Alabama has separately imposed fees of $112 per ton on out-of-state hazardous waste brought into Alabama for disposal, versus $40 per ton for in-state waste. This tax structure is of questionable legality. *See* Chemical Waste Management, Inc. v. Alabama Dep't of Revenue, No. 90-1098-PH (Ala. Cir. Ct., Feb. 28, 1991). While a tax that discriminates between in-state and out-of-state sources will most likely be unconstitutional, Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979) (holding that a higher tax on electricity transmitted out of state was invalid), a tax that treats the two equally will be upheld, even if it increases costs for the source state. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (upholding a 30% coal severance tax on the basis that it applied to all coal mined in Montana regardless of ultimate destination).

216. *See, e.g.,* EPA v. Environmental Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990) (ordering permanent closing of a hazardous waste disposal site due to RCRA violations).

legally shut the facility down. There is no reason to believe that Alabama,[217] Louisiana, and South Carolina will forever relish being the toxic waste dumps for the rest of the country,[218] just as New Jersey no longer wished to be known as a "Toxic Land Bridge" between Philadelphia and New York.[219] Society cannot reasonably expect, or demand, that receiving states continue to accept hazardous waste from states such as North Carolina,[220] which will not build a facility of its own. Yet, for the receiving states to shut their facilities on a nondiscriminatory basis will only exacerbate the national problem.

A reciprocity clause will permit these states to keep their sites open, while putting pressure on states elsewhere to resolve their own problems in a way that meets the reciprocity conditions. The purpose of reciprocity is to force states to address their problems, such as solid or hazardous waste, rather than to export them blithely to other states. As indicated, without use of reciprocity clauses, each state would be free, on traditional health and safety grounds, to close all landfills and hazardous waste facilities within its borders. The effect of such actions would be to chill interstate commerce, and turn the overall national problem into a true disaster. There is, at present, little incentive for generating states, such as Massachusetts, New Jersey, and North Carolina, to resolve their hazardous waste disposal problems internally, so long as there is an Alabama, Louisiana or South Carolina to receive their wastes.

If, pursuant to *City of Philadelphia v. New Jersey,* the basic question is whether the state is attempting to isolate itself from a problem common to many, then the reciprocity statute passes the standard as long as the state imposes the same preconditions on out-of-state waste as on its own. These measures will in fact *promote* interstate commerce by forcing each state to face up to its problems.

One of the goals of the commerce clause is to break down barriers to the free flow of commerce. One of society's goals is to resolve the national solid/

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217. As noted in the case, Alabama shipped about 57,000 tons of hazardous waste out of state for management, but imported about 500,000 tons for treatment and disposal. National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713, 717 n.6 (11th Cir. 1990), *modified, reh'g denied,* 924 F.2d 1001 (11th Cir. 1991).

218. Thus, in June, 1990, South Carolina enacted a statute to limit the amount of hazardous waste that can be imported into the state to 110,000 tons. *Governor Signs Hazardous Waste Import Bill; Owners of Commercial Landfill Plan Lawsuit,* 21 Env't Rep. (BNA) No. 8, at 376 (June 22, 1990).

219. *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). For a discussion of *City of Philadelphia,* see *supra* notes 172-81 and accompanying text.

220. *See, e.g., South Carolina to Prohibit Hazardous Waste from North Carolina at All Waste Facilities,* 21 Env't Rep. (BNA) No. 35, at 1597 (Dec. 28, 1990); N.Y. Times, Mar. 11, 1991, at A20, col. 4. North Carolina exported 111.5 million pounds of hazardous waste in 1989, of which approximately 71,000,000 pounds went to Alabama and South Carolina. After two years of futile effort, North Carolina failed to come up with solutions to disposing of hazardous waste in North Carolina, either by disposal sites or incineration. Alabama and South Carolina have responded by barring all North Carolina's hazardous waste from their states. The federal government has threatened to withhold federal cleanup money to North Carolina. *South Carolina to Prohibit Hazardous Waste, supra,* at 1597; N.Y. Times, *supra,* at A20.

hazardous waste disposal problem by maximizing the available options. Unlike the goal of an individual community, the broader goal is not to shut down facilities. Reciprocity agreements will foster solutions if otherwise applied on a nondiscriminatory basis. Use of reciprocity clauses by states such as Alabama is also one of the few tools that will realistically compel any semblance of regional planning across state lines. These provisions can thus serve as an impetus to local, regional, and interstate cooperation.

In looking at other commerce clause issues today, it is important to note that media focus often causes state and local jurisdictions to enact measures which are not necessarily designed to further some legitimate, local concern. Rather, media focus often results in legislative solutions that address broadly recognized, environmental concerns of society as a whole. For example, Vermont banned, effective with the 1993 model year, automobile air conditioners containing chlorofluorocarbons for coolants.[221] The purpose of the statute was to help preserve the earth's ozone level. In this respect, the state has taken it upon itself to help solve a national or international problem.

Conversely, several communities are banning polystyrene packaging, as used by McDonald's and other fast food restaurants, in efforts both to encourage recycling and to prolong the life of existing landfills.[222] Such nondiscriminatory bans, clearly designed to promote legitimate local concerns, should be deserving of greater constitutional protection than when the community is attempting to solve the world's problems.[223]

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221. VT. STAT. ANN. tit. 10, § 573 (1989).

222. In 1988, Suffolk County, New York banned the use of plastic grocery bags and other plastic food containers, effective in July, 1989. N.Y. Times, April 30, 1988, at 1, col. 1. The ban includes polystyrene packaging, and was a reaction in part to the solid waste disposal crisis on Long Island. *Id.* Several other communities followed suit. McDonald's subsequently announced that it was phasing out its plastic foam meal containers. Wall. St. J., Nov. 2, 1990, at A3, col. 2. *See generally* Note, *Thinking Globally and Acting Locally, St. Paul's Plastic Packaging Ordinance*, 11 HAMLINE J. PUB. L. & POL. 151 (1990) (discussing how state and federal environmental policies are affected through local legislation, and focusing on St. Paul, Minnesota's recently enacted statute that regulated the use of certain plastic food and drink packaging).

223. Analogous measures involving phosphate detergent bans and beverage container deposit provisions, often referred to as "Bottle Bills," have been sustained against commerce clause attacks, even though there is often a substantial impact on the free flow of commerce. These provisions are upheld because they do not discriminate between in-state and out-of-state sources of the substance, and because they are attempting to resolve a clearly perceived state or local problem. *See* Procter & Gamble v. City of Chicago, 509 F.2d 69 (7th Cir. 1975) (holding that a phosphate detergent ban initiated by the City of Chicago was a legitimate interest that did not constitute an impermissible interference with interstate commerce), *cert. denied*, 421 U.S. 978 (1975); Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975) (holding that a city ordinance that mandated return deposits on all soft drink or malt beverage containers did not violate due process, equal protection, the commerce clause, and was not void for vagueness); Soap & Detergent Ass'n v. Natural Resources Comm'n, 415 Mich. 728, 330 N.W.2d 346 (1982) (upholding a rule that limited the amount of phosphorous in cleaning agents sold in the state of Michigan); Can Mfrs. Inst. v. State, 289 N.W.2d 416 (Minn. 1979) (holding that Minnesota's Package Review Act did not impose an undue burden on interstate commerce and did not violate due process); American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973) (stating that a statute that regulated beverage containers was a legitimate exercise of the police power, and did

A final caveat is in order with respect to the commerce clause. One major limitation to the commerce clause is that, no matter how vigorously enforced, as presently construed it will not facilitate, by itself, the siting of new facilities. The clause will, however, prevent the discriminatory closing of existing sites and discriminatory restrictions on interstate commerce.

3. *Preemption*

The federal government and the states may preempt actions by lesser governmental bodies by including express preemption clauses in a statute. Clearly, when a problem reaches the point that it cries out for a solution, such as a society wallowing in its own garbage, then the political process forces Congress, the state legislatures, or other legislative entities to enact measures to resolve the issue. Congress can always change the law to remove legal obstacles to a proposal. Congress has done so in the past[224] and will undoubtedly do so in the future. At the point when the political pressures rise sufficiently to push for legislative action, the statute enacted by the higher political authority, whether it be the federal or state government, will inevitably diminish local control. The ultimate siting decisions will often be determined by political considerations as much as by environmental factors. Short of resorting to violence, local communities will often lose their ability to block a LULU.

If a higher governmental authority exercises its preemption power and enacts a statute that now mandates or dictates a solution, it would not mean that all the health, safety, or risk aspects have been resolved. Undoubtedly, the statute would parallel the Atomic Energy Act of 1954, which does not mandate a level of absolute safety or zero-risk. To do so would, of course, be to

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not violate the commerce clause, due process, equal protection, or the state constitution); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding a statute that banned the sale of milk in plastic, nonreturnable, nonrefillable containers since the purpose of the statute was to encourage the reuse and recycling of materials).

224. *See, e.g.*, Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989) (holding that a bill passed by Congress, which exempted an interstate highway construction project from certain requirements of the Department of Transportation Act, was constitutional); Sequoyah v. TVA, 480 F. Supp. 608 (E.D. Tenn. 1979) (noting that a provision in the Energy and Water Development Appropriations Bill authorized TVA to impound the Tellico River behind the controversial Tellico Dam notwithstanding requirements of the Endangered Species Act or "any other law"), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

Another example of how legal obstacles can be put up and then pushed aside is illustrated by the Seabrook Nuclear Plant in New Hampshire. Massachusetts, which is located just a few miles away from the plant, attempted to block operations of the plant by refusing to participate in the emergency response plans of the facility. These plans, often referred to as emergency evacuation plans, were required by the Nuclear Regulatory Commission in the aftermath of the Three Mile Island failure. In the end, the plant received a full operating license, which was generally believed to be a result of the 1988 presidential election. The Democratic nominee for president, Governor Michael Dukakis of Massachusetts, strongly opposed Seabrook, whereas Vice President Bush, the Republican nominee, backed it.

For the latest installment in the legal resolution of the Seabrook controversy, see Massachusetts v. United States Nuclear Regulatory Comm'n, 924 F.2d 311 (D.C. Cir. 1991).

chase a shibboleth.[225] A standard of absolute safety would continue the existing NIMBian paralysis. Instead, this Act mandates a reasonable assurance that the plant can be constructed and operated without "undue risk."[226]

As we have seen with the transportation of nuclear waste,[227] Congress has preempted local control through the Hazardous Materials Transportation Act.[228] There are, thus, situations in which the federal government has preempted local control.[229] Similarly, there are instances in which states have preempted local decisions. For example, Massachusetts has enacted legislation that effectively preempts local, substantive control of herbicide spraying.[230] Nonetheless, most regulatory statutes lack an express preemption clause, so courts are often left to infer one. A nascent trend is clearly developing whereby state law, at least for hazardous waste disposal, preempts local ordinances.

In *Stablex Corp. v. Town of Hooksett*,[231] the New Hampshire Supreme Court overturned a local ordinance that subjected any proposed hazardous waste facility to a popular vote.[232] Under New Hampshire state law, permission to construct or operate a waste treatment plant must be obtained from the state.[233] When Stablex Corp. originally sought local and state approval to construct a waste treatment facility, there was no approved hazardous waste disposal facility in New Hampshire, while eight known illegal sites had been discovered.[234] The state legislation was enacted against this background of a state and national emergency. The state statute created a new agency, the Bureau of Solid Waste Management, which was empowered to administer the comprehensive state program.[235]

Under the statute, a municipal hazardous waste facility review committee was to be created by the local municipality.[236] The committee's task was to study the effect of a proposed facility on the health and welfare of the people in the community, on its environment, and on its economy.[237] The committee

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225. As Chief Justice Burger wrote, "Perfect safety is a chimera; regulations must not strangle human activity in the search for the impossible." Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 664 (1980) (Burger, C.J., concurring).

226. 42 U.S.C. § 2232 (1988). *See generally* Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (deferring to the Atomic Energy Commission's decision to grant a license to operate a nuclear power plant).

227. *See supra* notes 32-34 and accompanying text.

228. 49 U.S.C. § 1811 (1988).

229. *See, e.g.*, CSX Transp. Inc. v. Public Utils. Comm'n, 701 F. Supp. 608 (S.D. Ohio 1988) (holding that state regulations that covered transportation of hazardous materials were preempted under the Federal Railroad Safety Act), *aff'd*, 901 F.2d 497 (6th Cir. 1990).

230. *See* Town of Wendell v. Attorney Gen., 394 Mass. 518, 530, 476 N.E.2d 585, 592 (1985).

231. 122 N.H. 1091, 456 A.2d 94 (1982).

232. *Id.* at 1094-95, 1104, 456 A.2d at 95-96, 101.

233. *Id.* at 1094, 456 A.2d at 95.

234. *Id.* at 1096, 456 A.2d at 96.

235. *Id.* at 1097, 456 A.2d at 97.

236. *Id.* at 1098, 456 A.2d at 98.

237. *Id.*

was required to submit a report advising a proposal, but the decision was to be made by the state agency.[238] In finding the local ordinance preempted by state law, the court reiterated its views that "where the State has enacted a comprehensive regulatory scheme, no local actions or ordinances will be permitted to contravene it."[239]

Other states have likewise recognized that the field of hazardous waste disposal is fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than a local, approach.[240] A more ingenious attempt by a Louisiana parish to ban a PCB and solvent cleaning establishment, through an emergency ordinance, was struck down as preempted by the federal Toxic Substances Control Act ("TSCA").[241] The ordinance was aimed at closing a recently opened PCB disposal facility. The facility conformed with the requirements of TSCA and the accompanying EPA regulations.[242] The site was within one-quarter mile of an elementary school.[243] Some of the testimony in the case revolved around standard "what if" arguments, such as the porosity of concrete, locations of the 1,000-year flood plain, and the volume of water that would pass through an eight-inch water line at sixty pounds per square inch pressure during six hours of continuous use.[244]

The court viewed TSCA as setting in place "a comprehensive, national scheme to protect humans and the environment from the dangers of toxic substances."[245] TSCA includes provisions that expressly regulate PCBs.[246] The EPA subsequently promulgated a comprehensive set of PCB disposal regula-

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238. *Id.*

239. *Id.* at 1102, 456 A.2d at 100 (citations omitted). However, Stablex Corp. subsequently abandoned the project after a four-year struggle, much to the delight of the community. Boston Globe, Nov. 18, 1984, at 88, col. 1.

240. Envirosafe Servs. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987) (holding that legislative history and a comprehensive state statutory scheme impliedly preempted local statutes attempting to regulate the disposal of hazardous wastes); Rollins Envtl. Servs. v. Iberville Parish Police Jury, 371 So.2d 1127 (La. 1979) (holding that an ordinance that prohibited the disposal of hazardous waste within the county was unconstitutional because it was not authorized by the legislature) *superseded by statute as stated in* Palermo Land Co. v. Planning Comm'n, 561 So.2d 482 (1990); *see also* Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986) (holding that a county ordinance that prohibited storage, treatment, or disposal of hazardous wastes was preempted by RCRA); Midcoast Disposal, Inc. v. Town of Union, 537 A.2d 1149 (Me. 1988) (state preemption for solid waste disposal). *Contra* Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985), *appeal dismissed,* 474 U.S. 1098 (1986).

241. Rollins Envtl. Servs. (FS) v. Parish of St. James, 775 F.2d 627 (5th Cir. 1985); *see also* Twitty v. North Carolina, 527 F. Supp. 778 (E.D.N.C. 1981) (granting defendant's motion for summary judgment where property owners brought action arising out of the storage of PCBs on adjoining property), *aff'd without opinion,* 696 F.2d 992 (4th Cir. 1982).

242. *Rollins,* 775 F.2d at 630.

243. *Id.*

244. *Id.* at 632.

245. *Id.*

246. 15 U.S.C. § 2617(a)(2)(B) (1988) (providing that all state regulation of hazardous chemicals is preempted when the administrator of the EPA issues a conflicting rule).

tions.[247] The TSCA preemption clause has a detailed procedure for obtaining exemptions from the preemption provision.[248]

The local ordinance at first was specifically aimed at PCBs, but as amended a month later, it applied to "solvent disposal" facilities without mentioning PCBs.[249] The ordinance banned solvent cleaning businesses within one mile of any "area of special concern," which was defined to include "a school, day care center, nursing home, grain elevator, public building or auditorium, hospital, church, or theater.[250] This provision would have eliminated eighty-three percent of the parish from consideration as a solvent disposal facility.[251] An additional provision banned solvent cleaning facilities within "an area of special environmental concern," which was defined as "a flood hazard area or flood plain, wetland, surface or subsurface drinking water source in St. James Parish."[252] The provision could have been construed to ban a solvent cleaning facility anywhere in the parish.[253]

In finding the parish ordinance preempted, the federal district court declared that, as a practical matter, the parish was saying "[no] without actually really every saying no."[254] Affirming, the appellate court recognized that the parish, "for reasons that are not difficult to comprehend, does not want this or any other toxic waste disposal facility located within its boundaries."[255]

The opinion is especially significant in that the court would not allow the community to block indirectly an unwanted facility when a direct attack would clearly run afoul of the preemption clause. The provisions of the ordinance were creatively crafted, using environmental grounds that could serve, if successful, as a model for communities elsewhere. Any jurisdiction could similarly adopt ostensibly legitimate environmental measures that, literally applied, would stop any LULU that could not be directly blocked.[256] As mentioned earlier, environmental objections can be raised to any proposal; therefore, it would not be difficult, as with the Louisiana parish, to draft an environmental protection measure that would effectively ban the proposal.

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247. 40 C.F.R. § 761.40-.79 (1989) (providing detailed specifications for labeling of specific products that contain PCBs, as well as specifications for incineration and burial of those products).

248. 15 U.S.C. § 2617(a)(2)(B) (1988).

249. Rollins Envtl. Servs. (FS) v. Parish of St. James, 775 F.2d 627, 630 (5th Cir. 1985).

250. *Id.* at 636. The ordinance also required a two-foot slab concrete foundation for solvent cleaning operations. *Id.* No other building ordinance contained such a requirement. *Id.* Expert testimony indicated that six inches would be sufficient. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* (endorsing the lower court's finding that although the effect was well intended, the ordinance was calculated to circumvent federal regulation and thereby disallow all PCB disposal facilities in the area).

254. *Id.*

255. *Id.* at 629.

256. As the court stated, "If every locality were able to dodge responsibility for and participation in these programs through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated." *Id.* at 637.

Of course, some communities might be more subtle in masking their real intent. We can premise, though, that any measure enacted shortly after a LULU is announced or completed is based on NIMBY concerns and not long-standing environmental concerns.[257] For example, East Providence, Rhode Island enacted an ordinance that banned the commercial use of coal anywhere in the city.[258] The purpose was to block a proposed coal-fired cogeneration electrical facility in the city.[259] The ban was held to be preempted under state law, and thus its future will be determined by state environmental law and regulations.[260]

Another representative example comes from Illinois, which enacted two statutes governing worker testing and training in the hazardous waste business.[261] The purposes were to promote job safety and to protect life, limb, and property.[262] The statutes overlapped similar, but less stringent, standards promulgated by the federal Occupational Safety and Health Administration ("OSHA"). OSHA has a general preemption clause that allows states to enter an area covered by OSHA if they obtain permission to do so.[263] Illinois, like many states, has not done so. In one sense, the Illinois provisions were part of a patchwork of legislation and regulations that emerged from government at various levels and reflected different approaches to containing a perceived risk. The statutory scheme was held preempted even though it served a "dual purpose"—public health and safety as well as workplace safety.[264]

In addition, some factors in a local regulatory scheme may be ruled facially unconstitutional for reasons other than preemption. For example, West Virginia's Solid Waste Management Act required landfill operators to obtain a permit from the Department of Natural Resources.[265] Numerous grounds are provided for denying a permit, with one clause giving the director of the department the power to deny a permit solely because it is "significantly adverse to the public sentiment of the area where the solid waste facility is, or will be, located."[266] In *Geo-Tech Reclamation Industries v. Hamrick*,[267] two permit applications were denied with "adverse public sentiment" given as a reason.[268] Upon challenging the denial of the applications on due process grounds, the

257. *See, e.g.*, Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986) (holding that a county ordinance which prohibited storage, treatment, or disposal of acute hazardous waste was preempted by RCRA).

258. Rhode Island Cogeneration Assocs. v. City of East Providence, 728 F. Supp. 828 (D.R.I. 1990).

259. *Id.*

260. *Id.* at 839.

261. *See* National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 673-74 (7th Cir. 1990) (citations omitted).

262. ILL. REV. STAT. ch. 111, paras. 7702, 7802 (1989).

263. 29 U.S.C. § 667(a) (1988).

264. *National Solid Wastes Management Ass'n*, 918 F.2d at 684.

265. W. VA. CODE § 20-5F-4(b) (1989).

266. *Id.*

267. 886 F.2d 662 (4th Cir. 1989).

268. *Id.* at 663-64.

applicants were granted summary judgment.[269] The Fourth Circuit affirmed the district court's finding that the provision was unconstitutional, as the "potential [for] mob rule was too great to ignore."[270]

Hamrick has been followed elsewhere. For example, a district court found "reliance upon public sentiment in the face of the substantial weight of the scientific and technical evidence to the contrary to be an arbitrary and unreasonable basis upon which to base the . . . decision."[271]

4. *Equitable Considerations*

What has often been missing from the of debate the past twenty years is a discussion of reason. Historically, nuisance law, through the concepts of reasonable use and unreasonable interference, and equity, through the concept of balancing of the equities, have considered the broad public good or benefit in resolving a dispute. Not every proposal has been stopped or enjoined simply because it would interfere with individuals. Instead, courts have traditionally balanced the equities in deciding whether or not to grant injunctive relief. As stated in *Riblet v. Spokane-Portland Cement Co.*:[272]

> Our basic point of inquiry relates to the general theory of the law of nuisance. This appears primarily to be based upon generally accepted ideas of right, equity and justice. The thought is inherent that not even a fee simple owner has a totality of rights in and with respect to his real property. In so far as the law of nuisance is concerned, rights as to the usage of land are relative. The general legal principle to be inferred from court action in nuisance cases is that no landowner will be permitted to use his land so unreasonably as to interfere unreasonably with another landowner's use and enjoyment of his land. The crux of the matter appears to be reasonableness. Admittedly, the term is a flexible one. It has many shades and varieties of meaning. In a nuisance case, the fundamental inquiry always appears to be whether the use of certain land can be considered as reasonable in relation to all the facts and surrounding circumstances. Application of the doctrine of nuisance requires a balancing of rights, interests and convenience.[273]

The unreasonableness test became a utilitarian test in industrial pollution cases during the nineteenth century. No nuisance would be found if the utility of the facility's manufacturing outweighed the harm that the neighbors suffered.[274] The factory would, therefore, be allowed to continue polluting with-

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269. *Id.*

270. *Id.* at 667.

271. Browning-Ferris Indus. v. City of Maryland Heights, 747 F. Supp. 1340, 1349 (E.D. Mo. 1990).

272. 41 Wash. 2d 249, 248 P.2d 380 (1952), *overruled by* Bradley v. American Smelting & Ref. Co., 104 Wash. 2d 677, 709 P.2d 782 (1986).

273. *Id.* at 254, 248 P.2d at 382.

274. Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions in Environmental Injunctions*, 9 ENVTL. L. 477, 486 (1979).

out compensating for the damages it caused.[275]

Over the years, the courts have found a number of land uses to be socially valuable and have thus refused to find a nuisance. For example, in the famous case of *Nicholson v. Connecticut Halfway House*,[276] the court found that the social good of halfway houses outweighed the putative private risks.[277] Significantly, this case echoes many of the NIMBY themes in that plaintiffs' objections were based on fear and depreciation of property values, even though no actual harm had yet occurred.

The *Nicholson* court emphasized that the power of equity to grant injunctive relief may be exercised only under demanding circumstances.[278] The court refused to grant such relief when the only justification proffered was fear and apprehension based on speculation.[279] As noted elsewhere, the threat of irreparable injury should be proven and not assumed.[280]

A California case further elaborated on the role of speculative harm, or fear, in public and private nuisance actions. In *Brown v. Petrolane*,[281] the court of appeals affirmed the trial court's dismissal of the plaintiffs' case where the only harm alleged was fear occasioned by the proximity of the defendant's above-ground liquified petroleum gas facility.[282] The facility was the largest in

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275. *See, e.g.*, Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886) (holding that the benefits that the coal industry gave to society outweighed any harm suffered by an individual plaintiff), *overruled by* Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974).

276. 153 Conn. 507, 218 A.2d 383 (1966).

277. *Id.* at 512-13, 218 A.2d at 386.

278. *Id.* at 511, 218 A.2d at 386. There is also, of course, case law to the contrary. *See, e.g.*, Everett v. Paschall, 61 Wash. 47, 111 P. 879 (1910) (granting an injunction against the operation of a private sanitarium, located in a residential area, that treated and cared for persons afflicted with tuberculosis); *see also* Arkansas Release Guidance Found. v. Needler, 252 Ark. 194, 477 S.W.2d 821 (1972) (granting an injunction against the operation of a halfway house for parolees and prisoners due to the diminution in property values in the area).

279. *Nicholson*, 153 Conn. at 511, 218 A.2d at 386. Some state statutes provide for injunctive relief only upon a strong showing of certainty of harm, as opposed to mere speculative risks. *See, e.g.*, ALA. CODE § 6-5-125 (1975) ("Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain, a court may interfere to arrest a nuisance before it is completed."); GA. CODE ANN. § 41-2-4 (1990) ("Where the consequence of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed.").

280. Town of Huntington v. Marsh, 884 F.2d 648, 653 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990); *see also* Citizens Ass'n of Georgetown v. Washington, 370 F. Supp. 1101 (D.D.C. 1974) (refusing to enjoin shopping center and garage since claimed harm was too speculative, stating that only EPA could make a determination since the violation had not yet occurred); City of Hammond v. Red Top Trucking Co., 409 N.E.2d 655 (Ind. Ct. App. 1980) (holding that a city could not ban excavation outright within three miles of the nearest residential district); O'Laughlin v. City of Fort Gibson, 389 P.2d 506 (Okla. 1964) (stating that clear and convincing evidence of a reasonable probability of injury is a necessary prerequisite to granting equitable relief against a threatened injury).

281. 102 Cal. App. 3d 720, 162 Cal. Rptr. 551 (1980).

282. *Id.* at 727, 162 Cal. Rptr. at 555.

the United States and was only 2,000 feet from the plaintiffs' home.[283] The complaint also alleged that the facility was not sufficiently earthquake-proof.[284]

The *Brown* court set forth the common law requirements for a cause of action based on public and private nuisance. Where, as in this case, the alleged nuisance is claimed to be both a public and a private one, the plaintiffs must show that the fear is common to their general community in order to recover under a public nuisance theory.[285] In addition, to recover under the private nuisance theory, the plaintiffs must allege some perceptible injury to their individual property rights apart from the harm suffered by the general public.[286] Applying these common law rules, the California appellate court found that the plaintiffs had not plead sufficient facts to support either cause of action;[287] in other words, the plaintiffs' fears did not satisfy the injury requirement.

Another classic case, one that displayed a more reasoned approach to nuisance claims, is *Boomer v. Atlantic Cement Co.*[288] In *Boomer,* the defendant's large cement plant, located south of Albany, clearly constituted a nuisance, spewing air pollutants that affected neighboring lands.[289] Cement plants have historically been a major source of air pollution.[290] The plant in *Boomer* had been encouraged to commence operations in an economically depressed area.[291] Despite this, the plaintiffs sought to enjoin operation of the plant.[292] The damage to the plaintiffs' property was relatively small, $185,000, compared to the defendant's investment of $45 million in the plant and the employment of 300 workers.[293]

The court recognized that air pollution was a problem far from solution with adequate technical procedures yet to be developed.[294] The court noted that solutions would require massive public expenditures, as well as regional and interstate controls.[295] Consequently, the court issued a call for judicial

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283. *Id.* at 721-22, 162 Cal. Rptr. at 552.

284. *Id.* at 722, 162 Cal. Rptr. at 553.

285. *Id.* at 726, 162 Cal. Rptr. at 554. If the complaint only alleges public nuisance, the plaintiffs must allege that they suffer special injury to themselves, different from that suffered by the rest of the community. *Id.* at 725, 162 Cal. Rptr. at 554.

286. *Id.*

287. *Id.* at 727, 162 Cal. Rptr. at 555.

288. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), *on remand,* 72 Misc. 2d 834, 340 N.Y.S.2d 97 (1972), *aff'd sub nom.* Kinley v. Atlantic Cement Co., 42 A.D.2d 496, 349 N.Y.S.2d 199 (1973).

289. *Id.* at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

290. *See, e.g.,* Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911) (upholding an injunction that prohibited cement production until dust emissions which were damaging adjoining property were controlled).

291. *Boomer,* 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

restraint:

> A court should not try to [control air pollution] on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River Valley.[296]

As a way out of the dilemma, the *Boomer* court granted an injunction that would be vacated upon the payment of permanent damages by defendant to plaintiff.[297]

Similarly, *Bradley v. American Smelting & Refining Co.*[298] was also a federal diversity case that involved the deposit of effluents from a smelter onto the plaintiffs' property. Somewhat analogous to the situation in *Brown v. Petrolane*,[299] the plaintiffs were merely complaining of their fears and mental anguish caused by the defendant's activities, as opposed to any physical injury to their persons.[300] In response to a request by the federal court to resolve certain state law issues, the Washington Supreme Court held that when the deposit of particles or substances accumulates on the land of another, and does not pass away, then a trespass has indeed occurred.[301] However, the court would not allow recovery unless the plaintiff had suffered actual and substantial damages.[302] The court found that "no useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and the litigious few would cause the escalation of costs to the detriment of many."[303]

Of course, when a court balances the equities to deny injunctive relief, it is, to some extent, sacrificing the interests of a few to the greater good of society. However, money damages will compensate the victims when real injuries occur.

When relief is sought, so as to enjoin a common law nuisance or a violation of a statutory provision such as the National Environmental Policy Act ("NEPA"), there are prerequisites that the plaintiff must meet. It is important

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296. *Id.* at 223, 257 N.E.2d at 871, 309 N.Y.S.2d at 314-15.

297. *Id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319.

298. 104 Wash. 2d 677, 709 P.2d 782 (1985) (answering certified questions from district court), *later proceeding*, 635 F. Supp. 1154 (W.D. Wash. 1986).

299. 102 Cal. App. 3d 720, 162 Cal. Rptr. 551 (1980). For a discussion of *Brown*, see *supra* notes 281-87 and accompanying text.

300. *See* Bradley v. American Smelting & Ref. Co., 635 F. Supp. 1154, 1158 (W.D. Wash. 1986).

301. *Bradley*, 104 Wash. at 692, 709 P.2d at 791.

302. *Id.*

303. *Id.*; *cf.* New England Legal Found. v. Costle, 666 F.2d 30 (2d Cir. 1981) (holding that when the use of high-sulphur fuel was authorized by the EPA, the neighbors were precluded from maintaining a common law nuisance action against the facility).

to recognize that injunctions are an equitable remedy and do not issue as a matter of course.

Generally accepted inquiries governing the issuance of preliminary injunctive relief include (1) the movant's likelihood of success on the merits, (2) whether or not the movant will suffer irreparable injury if the preliminary injunction does not issue, (3) whether or not that injury outweighs the harm to other parties if the preliminary injunction is issued, and (4) whether the grant or denial of the preliminary injunction is in the public interest.[304] The plaintiff has the burden of proof on these issues.

Section 936 of the *Second Restatement of Torts* provides a list of factors to be considered in balancing the equities:

> (1) The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:
>
> (a) the nature of the interest to be protected,
>
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
>
> (c) any unreasonable delay by the plaintiff in bringing suit,
>
> (d) any related misconduct on the part of the plaintiff,
>
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing and enforcing the order or judgment.[305]

When injunctive relief is sought, the courts should look closely at the public interest aspect of the balancing test. The reason for judicial restraint in the issuance of injunctive relief is the recognition of the "particularly onerous burdens" an injunction places upon the defendant and the issuing court.[306]

The Supreme Court's view on discretionary equitable relief is highlighted by *Weinberger v. Romero-Barcelo*.[307] The United States Navy has long used Vieques Island, off Puerto Rico, as a weapons training site. The trial court found a violation of the Federal Water Pollution Control Act (now the Clean Water Act—"CWA") for discharging munitions into navigable waters without a National Pollution Discharge Effluents System ("NPDES") permit.[308] The trial court ordered the Navy to file for the permit, but refused to issue a permanent

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304. *See* J. MOORE, J. LUCAS & K. SINCLAIR, MOORE'S FEDERAL PRACTICE ¶ 65.04 (2d ed. 1991); *see also* Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974) (finding that the district court erred in placing the burden of proving that the preliminary injunction should not issue on the defendant; rather, the plaintiff is required to prove that the injunction should issue).

305. RESTATEMENT (SECOND) OF TORTS § 936 (1977).

306. Shreve, *Federal Injunction and the Public Interest*, 51 GEO. WASH. L. REV. 382, 388-89 (1983).

307. 456 U.S. 305 (1982).

308. Romero-Barcelo v. Brown, 478 F. Supp. 646, 663 (D.P.R. 1979), *aff'd in part, vacated in part*, 643 F.2d 835 (1st Cir.), *on remand*, Romero-Barcelo v. Weinberger, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20,374 (D.P.R. 1981), *rev'd*, 456 U.S. 305 (1982).

injunction.[309] The Court of Appeals reversed, ordering the lower court to issue an injunction.[310] The appellate court held that the CWA removed equitable discretion, and that the statute required immediate injunctive relief for unpermitted pollutant discharges.[311]

The narrow issue the Supreme Court had to resolve was whether a district court is required to enjoin immediately all discharges of pollutants that fail to comply with the permit requirements of the CWA.[312] On a broader level, the question was whether injunctions must issue for statutory violations.

The Supreme Court held that discretion was available under the CWA, and that the trial court should employ the traditional test of balancing of the equities.[313] The Court quoted earlier opinions to the effect that since an injunction is an equitable remedy, it is not a remedy that issues as a matter of course or to restrain an act, the injurious consequences of which are merely trifling.[314] According to the Court, the basis for injunctive relief in federal court is irreparable injury and the inadequacy of legal remedies.[315] The traditional function of equity, the Court continued, has been as a " 'nice adjustment and reconciliation between the competing claims.' "[316] Hence, the Supreme Court directed the lower court to balance the equities between the parties.[317]

A decade earlier the Supreme Court had remarked:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damages" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.[318]

The *Weinberger* court echoed this theme by declaring, "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[319] The

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309. *Id.*

310. Romero-Barcelo v. Brown, 643 F.2d 835, 861-62 (1st Cir. 1981), *on remand,* Romero-Barcelo v. Weinberger, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20,374 (D.P.R. 1981), *rev'd,* 456 U.S. 305 (1982).

311. *Id.*

312. 456 U.S. 305 (1982).

313. *Id.* at 319-20.

314. *Id.* (citing Hecht Co. v. Bowles, 321 U.S. 321, 328 (1944), which held that under § 205(a) of the Emergency Price Control Act of 1942, the granting of an injunction is not mandatory, but is within the discretion of the court)).

315. *Id.* at 312.

316. *Id.* (citing Hecht v. Bowles, 321 U.S. 321, 329 (1944)).

317. *Id.* at 320.

318. Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 409 U.S. 1207, 1217-18 (1972).

319. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

Court further stated that judges are "not mechanically obligated to grant an injunction for every violation of law."[320] To the contrary, the exercise of equitable discretion includes the ability to deny as well as grant injunctive relief.[321]

Weinberger's majority distinguished the earlier, famous snail darter case, *TVA v. Hill*,[322] on the basis that the purpose and language of the Endangered Species Act,[323] which was at issue in *Hill*, left no such discretion.[324] Instead, that act compelled a "flat ban" on the destruction of critical habitats. In *TVA v. Hill*, the Court noted that Congress made it "abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."[325] Thus, unless Congress clearly indicates otherwise, courts of equity are free to, and in fact should, exercise their discretion and adopt a reasoned approach to determining the appropriate remedy for statutory violations.

The Supreme Court has also rejected the Ninth Circuit's view that " 'irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.' "[326] Like the appellate court in *Weinberger*, the Ninth Circuit had also emphasized that " 'only in rare circumstances may a court refuse to issue an injunction when it finds a NEPA violation.' "[327] In *Amoco Production Co. v. Village of Gambell*,[328] the Supreme Court reversed, looking to traditional equitable principles:

> [T]he environment can be fully protected without this presumption. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of large duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harm will usually favor the issuance of an injunction to protect the environment.[329]

The Supreme Court's view on the discretionary nature of equitable relief has been echoed in a number of NEPA suits.[330] Equitable remedies do not

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320. *Id.* at 313.

321. *Id.* at 320.

322. 437 U.S. 153 (1978), *superseded by statute as stated in* Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986); *superseded by statute as stated in* Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990) (recognizing that the act's use of the term "shall" left little discretion for interpretation).

323. 16 U.S.C. § 1531 (1988).

324. Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982).

325. *Hill*, 437 U.S. at 194.

326. Village of Gambell v. Hodel, 774 F.2d 1414, 1423 (9th Cir. 1985) (citing Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984)), *rev'd in part, vacated in part, sub nom.* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987).

327. *Id.*

328. 480 U.S. 531 (1987).

329. *Id.* at 545 (finding that injury to subsistence resources was not a likely result of exploration).

330. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390 (1976) (ruling that the defendants, federal agency officials, did not have to file an impact statement as required by § 102(2)(c) of the National Environmental Policy Act, since their proposal did not entail major federal action); *see also* Town of Huntington v. Marsh, 884 F.2d 648 (2d Cir. 1989) (ruling that a plaintiff seeking to

exist as a matter of course. While these Supreme Court decisions are certainly not binding on state courts deciding issues of state law, it is significant that the California Supreme Court has issued an opinion following the spirit of these cases.

The case, *Citizens of Goleta Valley v. Board of Supervisors*,[331] involved an eleven-year dispute over a proposed 400-room Hyatt Resort north of Santa Barbara.[332] The proposal was vigorously contested at every turn by the impacted citizens.[333] The requisite permits had been obtained from the California Coastal Commission and Santa Barbara County.[334]

The citizens wished to preserve the seventy-three acre cite as a nature preserve. Yet, the proposed resort was in an old oil field site, and hence lacked pristine qualities. In denying injunctive relief, the California Supreme Court stated, "we caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic or recreational development and advancement."[335]

One of the underlying rationales for granting equitable relief is the broad public policy of pursuing environmental protection. Nuisance law does not normally balance the equities when the state brings suit, on the assumption that the public attorney general, who represents the broad interests of the state and, thus, society as a whole, has already conducted the requisite balancing in deciding to sue.[336] On the other hand, private plaintiffs often sue on a private attorney general theory, purporting to vindicate the broad public interest. Often though, the plaintiffs are not very concerned with broad issues of environmental protection, but rather are motivate by parochial self-interest "garbed in the fashionable guise of environmental protection."[337] Plaintiffs are

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enjoin the dumping of dredged materials at a disposal site had to establish actual or threatened injury to the physical, biological, and chemical balance at the dump site), *cert. denied*, 110 S. Ct. 1296 (1990); Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978) (holding that the sale of oil and gas leases by the Department of Interior would not be set aside for alleged failure to gather sufficient evidence of environmental impact), *vacated in part sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

331. 52 Cal. 3d 553, 801 P.2d 1161, 276 Cal. Rptr. 410 (1990) (holding that reviewing court may not rule on the correctness of conclusions reached in an environmental impact report, but rather must limit review to the sufficiency of the information considered).

332. *Id.* at 560, 801 P.2d at 1164, 276 Cal. Rptr. at 413.

333. *Id.*

334. *Id.*

335. *Id.* at 576, 801 P.2d at 1175, 276 Cal. Rptr. at 424.

336. *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (granting the state of Georgia the right to sue in federal court for an injunction to prevent a Tennessee corporation from discharging noxious gas over Georgia territory). In an earlier decision where private parties sought equitable relief, an injunction was denied. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904).

337. In City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), the appellants contended that the New Jersey statute "while outwardly cloaked 'in the currently fashionable garb of environmental protection,' . . . is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents." *Id.* at 625-26 (citation omitted).

quite right to complain of their personal injuries, but we must keep in mind that they do not necessarily represent the broader public interest.

It is especially critical for courts to exercise discretion at the preliminary injunction stage. One of the major tactics developed by the NIMBY movement over the past two decades has been to delay a project through various means, such that the proponents will give up, abandon the project, or relocate it to another community. Inflationary pressures and other costs, including litigation expenses, could economically doom the project during this delay. A fundamental instrument of delay is litigation. Courts must, therefore, exercise their broad equitable discretion with great wisdom. The interests of the public must be carefully weighed in the deliberative process. The balancing of the equities is especially critical when scientific uncertainty is present. Clearly, when plaintiffs complain of injury to the public health, the courts must take a close look at the allegations.

In many situations the courts are asked to assess long-run health hazards in light of limited scientific knowledge. The overall benefits to society of the LULU may be known, but the risks are often long-term and highly speculative, yet potentially grave and irreversible. Professor Rodgers described the situation in traditional pollution compensation cases as follows: "A major difficulty with modern pollution cases is that they deal not so much with provable injuries but with risks and thus the question of the degree of injury is complicated both by actual uncertainties and burden of proof preferences."[338] The problem is succinctly stated in *Reserve Mining Co. v. United States*: "what manner of judicial cognizance may be taken of the unknown."[339]

It is important to recognize, whether it be a suit seeking injunctive relief or one challenging or demanding the issuance of regulations, that the courts are dealing with policy decisions on the frontiers of scientific knowledge.[340] However, since so many health claims today are of a speculative and conjectural nature, courts should demand scientific evidence of the health threat.[341] Courts should, therefore, require that restrictions be based on scientific fact. Courts are already beginning to exercise a healthy skepticism towards theoretical claims in other contexts.[342]

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338. W. RODGERS, *supra* note 68, at 115.

339. Reserve Mining Co. v. United States, 498 F.2d 1073, 1084 (8th Cir. 1974).

340. As stated in Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974):

> some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis. Thus, in addition to currently unresolved factual issues, the formulation of standards involves choices that by their nature require basic policy determinations rather than resolution of factual controversies.

Id. at 474-75.

341. The *Reserve Mining* decision also stated, "We are a court of law, governed by rules of proof, and unknowns may not be substituted for proof of a demonstrable hazard to the public health." *Reserve Mining*, 498 F.2d at 1084.

342. *See, e.g.*, Ohio v. EPA, 784 F.2d 224 (6th Cir. 1986) (holding that the EPA could not use

Opinions and recommendations by regulatory agencies with expertise in the area are, pursuant to traditional administrative law, highly relevant in addressing the "what if." Since uncertainty is inherent in these policy decisions, the experts should be allowed to exercise their best judgment. As the Supreme Court stated in a nuclear case, "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When determining this kind of scientific determinations, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[343]

Restraint is especially called for when, as with *Nicholson v. Connecticut Halfway House*,[344] the plaintiffs are complaining of a prospective threat. In such a situation, the plaintiffs are in fact asking courts to predict the future—an obviously impossible task even in situations where an adequate database and historical record exists. It is always possible for the plaintiffs to dream up a worst-case scenario based upon hypothesis and speculation—the "what if." Courts must look carefully at these claims to separate fact from fiction, probable from remote, and concrete from speculative. A bare risk of the unknown should not amount to proof of injury.[345]

Courts should, therefore, subject the plaintiff's claim to strict scrutiny, to insure that the plaintiff meets the showing of "probable irreparable harm" as a prerequisite to the granting of injunctive relief.[346]

III. CONCLUSION

Alexander the Great cleverly cut the complicated Gordian Knot with his sword. Because of our system of government by the people, of the people, and for the people, and the underlying complexity of dissimilar issues, no such "simplistic" approach is available to us for cutting the NIMBian Knot.

Yet, with NIMBY paralysis spreading through many areas, society has in-

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modeling to set air pollution emissions limitations for smoke stacks of two electric utilities without validating the trustworthiness of the model); Gulf South Insulation v. Consumer Prod. Safety Comm'n, 701 F.2d 1137 (5th Cir. 1983) (holding that there was insubstantial evidence before the commission to support a ban on the use of urea-formaldehyde foam insulation, recognizing the limited usefulness of animal studies when confronted with the question of toxicity); *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1241 (E.D.N.Y. 1985) (holding that studies of animal exposure to Agent Orange were not persuasive because animal tests "are of so little probative force and are so potentially misleading as to be inadmissible"), *aff'd*, 818 F.2d 204 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

343. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 103 (1983).

344. 153 Conn. 507, 218 A.2d 383 (1966). For a discussion of *Nicholson*, see *supra* notes 276-79 and accompanying text.

345. Reserve Mining Co. v. United States, 498 F.2d 1073, 1084 (8th Cir. 1974); *see also* Citizens Ass'n of Georgetown v. Washington, 370 F. Supp. 1101 (D.D.C. 1974) (refusing to issue a preliminary injunction as no threat of immediate injury existed for construction of buildings).

346. *See* Town of Huntington v. Marsh, 884 F.2d 648, 653 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990); Elliott v. United States Fish & Wildlife Serv., 747 F. Supp. 1094, 1101 (D. Vt. 1990).

creasingly compelled communities to accept LULUs. There are obviously situations in which the political and judicial system can force an unwanted proposal onto a community. To the extent that facilities cannot be voluntarily sited, there is every reason to anticipate a greater use of coercion to force communities into accepting, even if not liking, LULUs.

Proponents of a project should recognize the concerns of the impacted communities and work closely with the people who are adversely affected or threatened by the proposal. It is imperative not to approach any given proposal simply from a technical perspective; the nontechnical, intangible human concerns often outweigh the objective criteria of the project.

From a legal perspective, courts should not appraise a proposal in isolation. The NIMBY pattern is for the impacted community to look narrowly at the impacts and risks posed to it alone. The "what if" becomes the critical analysis for the community. Courts though, especially in the context of equity and nuisance, should look to the total context of the proposal, including the reasonable alternatives, and the consequences of not proceeding with it. In the context of an imperfect world, a flawed approach may often be better than no action. Probably no perfect site, either in an environmental or in an absolute zero-risk sense, exists.

Nuisance law has traditionally recognized that we must all, to some extent, bear with the everyday annoyances of living in an urban society. We cannot reasonably expect perfect solitude in the middle of a city; midtown Manhattan is not the place to listen to the music of the spheres. The NIMBY/"what if" approach can take a minor aggravation, actual or conceivable, and blow it out of proportion. In light of the perceived public benefits of many projects, courts should look closely at the "what if" before readily issuing injunctive relief.

Reserve Mining asked the question: What cognizance should be taken of the unknown?[347] Our response is that "what if" claims must be assessed with a healthy skepticism. The relative ease of crafting a "what if" should not blind courts into looking essentially at the speculative impacts on the community, versus the project in its total context.

In doing so, we must recognize that we are taking a risk, hopefully of both low probability and magnitude, with the future. The alternative, though, is to perpetuate NIMBian paralysis.

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347. *Reserve Mining*, 498 F.2d at 1084.